JANUARY 8/15, 2001

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Gore Vidal

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CLINTON FOLLOWS THE MONEY
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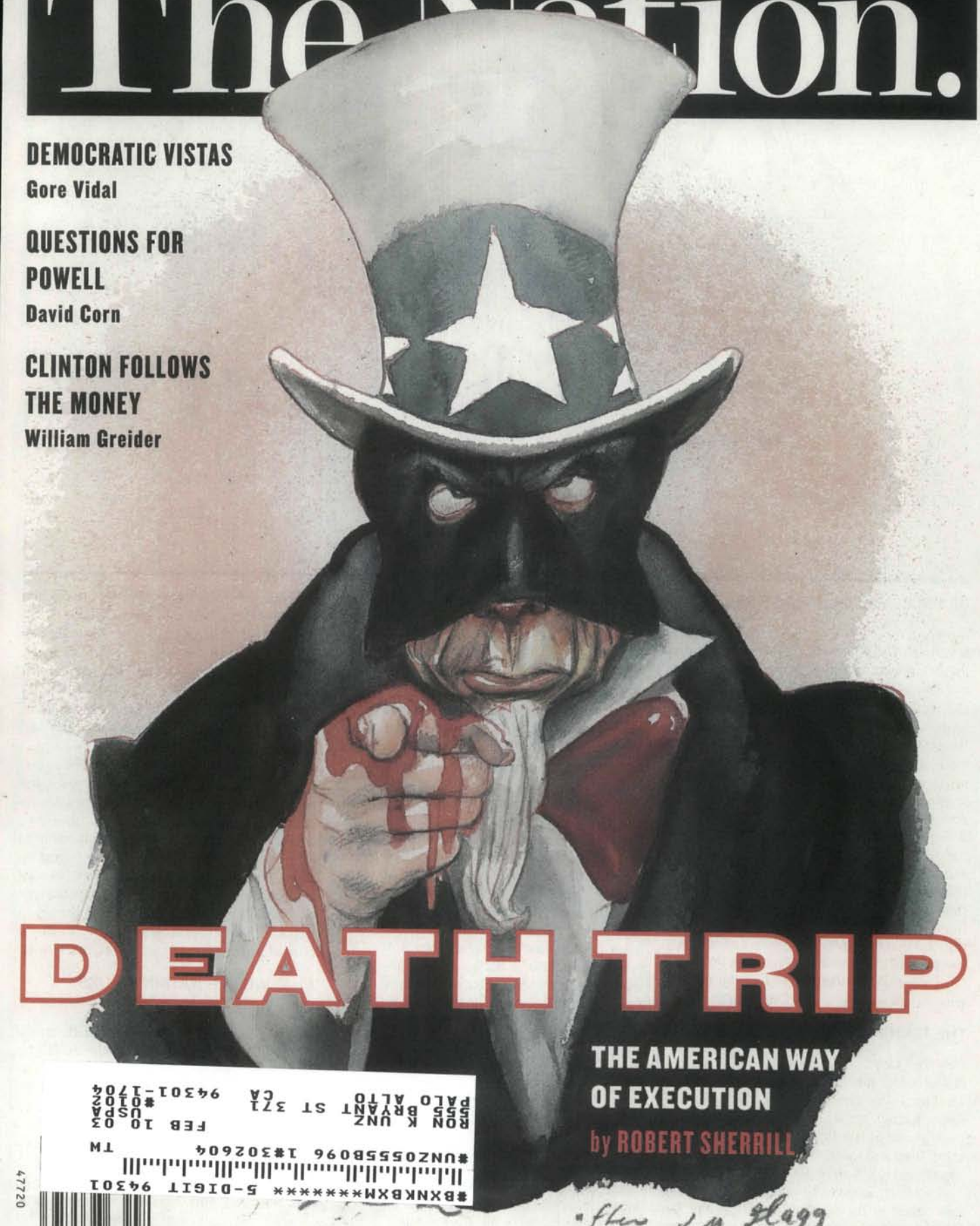

DEATH TRIP

THE AMERICAN WAY OF EXECUTION
by ROBERT SHERRILL

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STEVE BRODNER

LETTERS

DIVORCE, AMERICAN STYLE REDUX

Las Vegas

■ Perhaps I can have the last word on Katha Pollitt's review of Judith Wallerstein's *Legacy of Divorce* ["Subject to Debate," Oct. 23; "Exchange," Dec. 4]. I'm a sociologist who has written and taught about marriage and family for seven years. Whatever the merits of the methodological debate on Wallerstein, I have my own method of truth, which although nonscientific has proven extremely reliable. Every semester I ask my students to raise their hands if their parents are divorced. As in the rest of the population, around half raise their hands. I then ask them to keep their hands raised if they wish their parents had *not* divorced. Without exception, all but one or two hands fall. When I ask those who lowered their hands, "Why?" they respond that the stress and conflict of unhappy parents took an intense emotional toll on them.

If the children themselves have no regrets, why should we? DR. ROBERT MANIS

THE TENNIS, POKER & BLACKLIST BOYS

New York City

■ The recent moving tributes to the late Ring Lardner Jr. by Victor Navasky [Nov. 27] and Roger Kahn [Dec. 4] encourage me to add my own, as one of Ring's few contemporaries still alive. Ring and I were both born in Chicago on the same day—August 19, 1915.

I was privileged to be part of a poker game that began in the 1950s when Ring and Ian Hunter, with Maurice Rapf and the composer Sol Kaplan, moved to New York after the blacklist drove them out of Hollywood, and included many of the lawyers who defended them, like Martin Popper, Jerry Lurie and his law partner Sidney Cohen. Sidney had invented what came to be known as the "diminished Fifth," which would have permitted answers to the key question raised by HUAC without naming names, which Ring famously said he could answer but that he would hate himself in the morning.

We had all reached the age when we felt that for health reasons we would meet every Thursday to play two hours of tennis at 4 PM before reassembling for poker in the evening. For about thirty years, until we could no longer play either tennis or poker, Thursday became for all of us the high spot of the week. We began by occasionally joining a poker game on 28th Street, dominated by Zero Mostel and his former WPA artist friends, that had begun back in the Depression; but the high decibel level of any game with both Zero and sculptor Herb Kallem drove us to organize our own Upper West Side tennis/poker group. To fulfill our wildest fantasies, we decided to play our first game at a Turkish bath at Al Roon's on West 73rd Street, as suggested by a short story by Irwin Shaw, but we found that the steam melted the cards, and we were forced to rent a room to finish the evening.

For the next thirty years the game was held at Ian's apartment in the Belnord on 86th Street. Ian was a great cook and would sometimes prepare a delicious roast beef for us. Otherwise, the kitty would permit us to order from the Stage Door Delicatessen or the Tip Toe Inn.

When the blacklist was finally broken and Ring could write under his own name, I like to think that we all had a hand in his script for *The Cincinnati Kid*. After Ring's second Oscar, for *M*A*S*H*, we all enjoyed hearing that the pendulum in Hollywood had swung to the point that blacklisted writers had become social lions, and some people were now lying that they had been blacklisted.

While we almost never talked about our personal problems all through those years, the weekly meeting became a refuge from a hostile world for those of us who retained the ideals we had formed in the Depression years. In addition to the original group, we were later joined by Bella Abzug's husband, Martin, Peter Bernard and Jesse Reed. Maurice and I, alas, are the sole survivors. The group left an important legacy to our children—to appreciate the joys of living a life of principle. JAY M. GOULD

WHAT WORKS: METROPOLITICS

Orange, Va.

■ Thanks to Jay Walljasper for a terrific article ["From the 'Burbs to the 'Hood," Nov. 20] on Myron Orfield and his plans (and achievements) for metropolitics! Orfield explains why, in the words of many a Republican, "schools need more than just money." Schools—all schools—need more money and lots of it. But the concentration of severely poor students in certain schools, not relative underfunding, is key to their relative failure. Vouchers will only aggra-

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EDITORIALS

Executioners' Swan Song

Evidence is mounting that the coming twelve months hold the best opportunity for a fundamental change in death-penalty politics since the Supreme Court reinstated capital punishment in 1976. You wouldn't know this from the sclerotic policies of the nation's pre-eminent political leaders. George W. Bush will take the oath of office bearing the all-time record for signing off on executions: forty in Texas this past year. President Clinton, meanwhile, leaves office playing politics with death as surely as he did in the case of Rickey Ray Rector in 1992. Faced with the first federal execution in forty years, Clinton had the chance to impose a moratorium and instead punted with a six-month stay, sticking George W. Bush with the troublesome case of Juan Raul Garza and thus in all likelihood leaving Garza to face lethal injection.

None of these men seem to have noticed how profoundly and rapidly the public's attitude toward capital punishment shifted in 2000. Thanks in part to the Illinois death-penalty moratorium imposed last January by Governor George Ryan, a majority of Americans now seem ready to consider whether capital punishment might be, as Robert Sherrill writes in this issue, a bad bargain in every way. In August an NBC News/*Wall Street Journal* poll found that 63 percent of Americans now favor a suspension of executions until the fairness of capital trials can be studied. This followed earlier Gallup polls showing that overall support for capital punishment has fallen by about 15 points in the past few years and that nearly half would abandon executions altogether if given the option of life imprisonment without parole. Even Texas's record number of executions bucks a national trend: Executions fell nationwide last year by 13 percent.

Forces and trends that will make capital punishment one of the defining issues of the coming year are converging from several directions. Bush's record in Texas will focus new attention on the Garza case. Even some previously silent Congressional Democrats may see cold political currency in seizing the initiative. Representative Jesse Jackson Jr. and Senator Patrick Leahy plan to reintroduce their national death-penalty-moratorium proposals, which will likely surface just as the Garza case approaches its deadline. Their bills will be propelled by a raft of credible recent studies on flawed convictions.

At the grassroots, capital punishment has suddenly caught fire: Thirty-eight municipalities and more than 1,200 organizations have passed resolutions or referendums calling for a national death-penalty moratorium, including cities on such traditional death-penalty terrain as North Carolina and Georgia. And in the media, the *Chicago Tribune*, whose revelation of systematic flaws in Illinois death-row justice prodded Governor Ryan to his moratorium, has expanded its ongoing inquiry into capital injustice to the national stage, most recently (December 18) detailing the 1998 Florida execution of Leo Jones, who may well have been an innocent man.

The death penalty has long isolated the United States among Western industrial nations, but Bush's elevation seems certain to escalate tensions. Protests about the plight of Mexican nationals on Texas's death row—people who often spend years without proper consular access—have recently driven a wedge between Washington and Mexico City. In Europe, US executions

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COMMENT

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routinely attain a front-page status rarely accorded them on this side of the water. The European Union, which does not hesitate to sanction its own members for human rights violations, is looking for new avenues to pressure the United States. On December 19 United Nations Secretary General Kofi Annan endorsed the call for a moratorium.

The year 2001 could be the one in which America calls a halt to its long love affair with capital punishment. But the people must make it loudly clear to politicians that the death trip is over.

COMMENT

Democratic Vistas

The Vice President to Richard Nixon and bribe-taker to many, Spiro Agnew, was once inspired to say, "The United States, for all its faults, is still the greatest nation in the country." Today, even in the wake of the Supreme Court's purloining of the election for the forty-third President, Spiro must be standing tall among his fellow shades. Have we not come through, yet again? As we did in 1888 when Grover Cleveland's plurality of the popular vote was canceled by the intricacies of the Electoral College, and as we even more famously did in 1876 when the Democrat Samuel Tilden got 264,000 more votes than the Republican Rutherford B. Hayes, whose party then challenged the votes in Oregon, South Carolina, Louisiana and—yes, that slattern Florida. An electoral commission chosen by Congress gave the election to the loser, Hayes, by a single vote, the result of chicanery involving a bent Supreme Court Justice appointed by the sainted Lincoln. Revolution was mooted but Tilden retired to private life and to the pleasures of what old-time New Yorkers used to recall, wistfully, as one of the greatest collections of pornography in the Gramercy Park area of Manhattan.

Until December 12, we enjoyed a number of quietly corrupt elections, decently kept from public view. But the current Supreme Court, in devil-may-care mood, let all sorts of cats out of its bag—such as a total commitment to what the far right euphemistically calls family values. Justice Antonin Scalia—both name and visage reminiscent of a Puccini villain—affirmed family values by not recusing himself from the Bush-Gore case even though his son works for the same law firm that represented Bush before the Court. Meanwhile, Justice Clarence Thomas's wife works for a far-right think tank, the Heritage Foundation, and even as her husband attended gravely to arguments, she was vetting candidates for office in the Bush Administration.

Elsewhere, George W. Bush, son of a failed Republican President, was entrusting his endangered Florida vote to the state's governor, his brother Jeb.

On the other side of family values, the Gore clan has, at times, controlled as many as a half-dozen Southern legislatures. They are also known for their forensic skill, wit, learning—family characteristics the Vice President modestly kept under wraps for fear of frightening the folks at large.

American politics is essentially a family affair, as are most oligarchies. When the father of the Constitution, James Madison,

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COMMENT

was asked how on earth any business could get done in Congress when the country contained a hundred million people whose representatives would number half a thousand, Madison took the line that oligarchy's iron law always obtains. A few people invariably run the show; and keep it, if they can, in the family.

Finally, those founders, to whom we like to advert, had such a fear and loathing of democracy that they invented the Electoral College so that the popular voice of the people could be throttled, much as the Supreme Court throttled the Floridians on December 12. We were to be neither a democracy, subject to majoritarian tyranny, nor a dictatorship, subject to Caesarean folly. John Adams said we were to be a nation of laws, not men, which has since boiled down to a nation of lawyers, not people—or, at least, of people who count or get counted in elections.

Another cat let out of the bag is the Supreme Court's dedication to the 1 percent that own the country. Justice Sandra Day O'Connor couldn't for the life of her see why anyone would find the butterfly ballot puzzling. The subtext here was, as it is so often with us, race. More votes were invalidated by aged Votomatic machines in black districts than in white. This made crucial the uncounted 10,000 Miami-Dade ballots that recorded no presidential vote. Hence the speed with which the Bush campaign, loyally aided and abetted by a 5-to-4 majority of the Supreme Court, invented a series of delays to keep those votes from ever being counted because, if they were, Gore would have won the election. Indeed he did win the election until the Court, through ever more brazen stays and remands, with an eye on that clock ever ticking, delayed matters until, practically speaking, in the eyes of the five, if not all of the four, there was no longer time to count, the object of an exercise that had sent trucks filled with a million ballots from one dusty Florida city to the next, to be kept uncounted.

During this slow-paced comedy, there was one riveting moment of truth that will remain with us long after G.W. Bush has joined the lengthening line of twilight Presidents in limbo. On the Wednesday before the Thursday when we gave thanks for being the nation once hailed as the greatest by Agnew, the canvassing board in Dade County was, on the orders of the Florida Supreme Court, again counting ballots when an organized crowd stormed into the county building, intimidating the counters and refusing to give their names to officials. The *Miami Herald*, a respectable paper, after examining various voting trends, etc. concluded that Gore had actually carried Florida by 23,000 votes. The *Herald* plans to examine those much-traveled ballots under Florida's "sunshine" law. I suspect that the ballots and their chads will be found missing.

Thanksgiving came and went. The ballots toured up and down the Florida freeways. Gore was accused of trying to steal an election that he had won. The black population was now aware that, yet again, it had not been taken into account. There had been hints. Under Florida law, anyone with a criminal record—having been convicted of a felony—loses all civil rights. Thousands of blacks were so accused and denied the vote; yet most so listed were not felons or were guilty only of misdemeanors. In any case, the calculated delays persuaded two of the four dissenting judges that there was no time left to count.

Justice John Paul Stevens, a conservative whose principal interest seems to be conserving our constitutional liberties rather than the privileges of corporate America, noted in his dissent: "One thing, however, is certain. Although we may never know with complete certainty the identity of the winner of this year's presidential election, the identity of the loser is perfectly clear. It is the nation's confidence in the judge as an impartial guardian of the rule of law."

What will the next four years bring? With luck, total gridlock. The two houses of Congress are evenly split. Presidential adventurism will be at a minimum. With bad luck (and adventures), Chancellor Cheney will rule. A former Secretary of Defense, he has said that too little money now goes to the Pentagon even though last year it received 51 percent of the discretionary budget. Expect a small war or two in order to keep military appropriations flowing. There will also be tax relief for the very rich. But bad scenario or good scenario, we shall see very little of the charmingly simian George W. Bush. The military—Cheney, Powell et al.—will be calling the tune, and the whole nation will be on constant alert, for, James Baker has already warned us, Terrorism is everywhere on the march. We cannot be too vigilant. Welcome to Asunción.

GORE VIDAL

The current revival of Gore Vidal's The Best Man *ends its limited run on Broadway December 31 at the Virginia Theater.*

Questions for Powell

Colin Powell, George W. Bush's designated Secretary of State, is a national icon, with a personal story celebrated by millions. When he hits Capitol Hill for his confirmation, he can expect to receive a fair dose of senatorial genuflection. But the retired general does not deserve hands-off hearings. On policy matters, he may be asked to explain the so-called Powell Doctrine (which calls for an overwhelming use of force when the military is unleashed), his initial skepticism toward US involvement in the Gulf War and his advocacy of a Pentagon budget that would permit the United States to fight two regional conflicts simultaneously. Such matters could be respectfully broached by senators. But there are also some indelicate questions about Powell's past deeds—queries that challenge the image of Powell the Hero—that ought to be posed.

§ *My Lai.* In July 1968, Powell was sent to Vietnam and assigned to the Americal Division as an executive officer. On March 16, 1968, troops from this division had slaughtered more than 300 civilians in the hamlet of My Lai, and the massacre went unreported. In December 1968, after Powell had been promoted to operations officer at division headquarters, he was forwarded a letter written by Tom Glen, a former GI, who criticized the American military for brutalizing civilians, torturing prisoners and for, "without provocation or justification," shooting at "the people themselves." As *The New Republic* reported in 1995, Powell was told to check out the allegations, which did not mention My Lai. Powell interviewed a few officers and reported that there was nothing to Glen's assertions. He didn't bother to ask Glen for more specific information. Powell did not mention

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COMMENT

this inquiry in his 1995 memoir, *An American Journey*. He did, however, recall the occasion in March 1969, when an Army investigator visited his office and asked to see the enemy-kill records of March 1968. Powell found a high number—128—for March 16 and read the number into the investigator's tape recorder. (That investigator, who was probing specific allegations about My Lai, subsequently reported that there had been no massacre.) In his autobiography, Powell noted that his "curiosity" was aroused by the investigator. But he did not pursue the matter. Why not? And why had he taken a less-than-vigorous approach when conducting the earlier investigation? Why didn't he seek more information from Glen? Once the My Lai story broke in November 1969, why didn't Powell look into whether he had been lied to by his fellow officers? Moreover, what did he learn from this experience about conducting internal investigations within a bureaucracy?

§ *Human rights abuses.* In the 1980s Powell served on Ronald Reagan's national security team. He was the special military assistant to Defense Secretary Caspar Weinberger from 1983 to 1986, then deputy national security adviser from late 1986 to 1987 and, after that, National Security Adviser. Throughout the Reagan years, the Administration supported militaries in Guatemala, El Salvador and Honduras—and the *contras* in Nicaragua—which engaged in blatant human rights abuses, misdeeds that frequently were publicized by human rights advocates and dismissed by the Reagan Administration. In his book Powell noted that during his stint with Weinberger, he became "the chief administration advocate" for the *contras*. Referring to the corruption of several *contra* leaders, Powell wrote, "In the old days of East-West polarization, we worked with what we had." What today might justify Washington's support for corrupt or abusive forces abroad? Did Powell ever take an interest in the human-rights violations committed by the *contras* and the US-backed armies in Central America?

§ *Iran*/contra. In 1987 independent counsel Lawrence Walsh asked Weinberger to hand over records regarding the Iran/*contra* scandal. Weinberger produced a modest amount of nonincriminating material. That same year, Congressional investigators questioned Powell about the scandal and asked whether Weinberger maintained a diary. In sworn testimony, Powell replied, "The secretary, to my knowledge, did not keep a diary." In 1991 Walsh discovered that Weinberger had written thousands of pages of diary notes—which included material contradicting his Iran/*contra* testimony. A grand jury indicted Weinberger for concealing these records. Weinberger's lawyers asked Powell for a sworn statement in which he would confirm that Weinberger had not treated these diaries as secret material that could be hidden from Walsh. Powell obliged and declared, "I observed on his desk a small pad of white paper, approximately 5" X 7". He would jot down on this pad in abbreviated form various calls and events during the day. I viewed it as his personal diary." This sworn affidavit contradicted Powell's 1987 sworn statement. In his final report, Walsh concluded that Powell's 1987 testimony was "at least misleading" and "designed to protect Weinberger." But Walsh opted not to prosecute Powell. In his memoirs Powell claimed that he told the investigators in 1987 that Weinberger kept notes but that he (Powell) had not considered these papers to be a diary until they were shown to him in 1991. But in 1987 Powell had not stated that Weinberger kept specific notes. And Walsh produced evidence indicating that Powell had actually helped create Weinberger's daily diary entries. So why didn't Powell in 1987 describe the diaries to the investigators in the detailed terms he used in 1991? According to his book, Powell waited for the investigators to "press" him with "follow-up questions" and said nothing more because they didn't ask. Is this his view of cooperation with Congress—never volunteer?

§ *Operation Just Cause.* In December 1989 Powell, then Chairman of the Joint Chiefs of Staff, oversaw the US invasion of Panama. As American troops pursued narco-dictator and onetime US asset Manuel Noriega, they swept through El Chorrillo, a poor neighborhood in Panama City, and many civilians were caught in the combat. At first, the Pentagon referred to civilian casualties vaguely as "collateral damage." Two weeks later—after Noriega was nabbed—the Pentagon announced that 201 Panamanian civilians had been killed (and twenty-three American troops). Several months later, Americas Watch, a human rights organization, released a report finding that US forces had violated the Geneva Conventions by failing to minimize harm to the civilian population. The report noted that the "command of the American forces also failed to live up to its duties as to the collection of and accounting for the wounded and the dead among civilians." And a Physicians for Human Rights inquiry found that at least 300 civilians had died in the invasion, that 3,000 Panamanians received serious injuries during the operation and that 15,000 Panamanians were displaced (of which only 3,000 received US assistance). In his book, Powell concluded that Just Cause confirmed the Powell Doctrine: "Use all the force necessary and do not apologize for going in big if that's what it takes." Why did his military not conduct a thorough evaluation of civilian casualties and better tend to the displaced and injured? How does he reconcile the Powell Doctrine with the Geneva Conventions?

§ *Gulf War Syndrome.* The Persian Gulf War turned Powell into a star. But in the years following Desert Storm, thousands of vets developed a variety of illnesses. As of the end of 1999, 184,000 of the 697,000 Gulf War troops had filed disability claims with the Department of Veterans Affairs, of which 136,000 were approved. The VA has acknowledged that Gulf War veterans suffer from chronic and ill-defined symptoms, including fatigue and neurocognitive and musculoskeletal problems. The Pentagon concedes that 100,000 US troops were exposed to low levels of nerve gas. Veterans advocates have accused Powell of being MIA on Gulf War Syndrome. "Four to five years ago, Gulf War vets were being turned away from the VA," says Charles Sheehan-Miles, a director of the National Gulf War Resource Center and a healthy Gulf War tank crewman. "You'd expect the military leaders would have something to say about that. We got silence from Powell, Schwarzkopf and Cheney. We wrote a couple of letters to Powell asking for help and never got a response. This was a severe disappointment." In 1998, when studies showed that Gulf War vets were sick possibly due to nerve gas exposure, Powell, in an interview, downplayed the link between Gulf War service and illness. Why was Powell reluctant to recognize Gulf War syndrome? Why has he not been a vocal supporter of the troops who fought for him?

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Not standing with sick veterans, misleading Congressional investigators, leaving the counting of civilian dead to others, participating in a foreign policy apparatus that ignored and discounted human rights violations, mounting a less-than-vigorous inquiry into charges of military atrocities—all is not glory with Colin Powell. It is unlikely senators will wade too far into the muck of Powell's none-too-heroic past. Powell's rise—often hailed as proof that the American Dream is real—demonstrates a potent political reality: Star-power shine can be a most effective camouflage.

DAVID CORN

Clinton Follows the Money

The power play was swift, effective and ugly. Within hours of Albert Gore's concession, Bill Clinton was moving the levers of insider politics to install his personal money guy, Terry McAuliffe, as the next chairman of the Democratic National Committee. Mr. Albert is already history because Mr. Bill intends to run this party for the next four years. That is terrible news for any hope that the out-of-power Democrats might regenerate themselves as the party of new ideas and fundamental reforms. Clinton will defend his checkered legacy and advance his own unspecified ambitions by dispensing the mother's milk of politics—money—to those Democrats who adhere to his manipulative, hollow style of leadership. Think small, act symbolically. Talk reform, but stick with the New Democrat moneybags on the big economic questions.

Among other things, this move makes a weak joke out of the Democrats' supposed commitment to campaign finance reform. Indeed, it insures that the stench of extralegal money scandals that Clinton-McAuliffe generated will continue to hang over the party. Only now, George Bush's Justice Department will be in charge of the investigations and may show more thoroughness than Clinton's has. Has the statute of limitations expired on the 1996 election and other money schemes connected to McAuliffe? Democrats must hope so if they allow this guy to become nominal party leader.

The DNC has not been a meaningful institution for many years—it's a mail drop for political money, that's all—and normally no one except insiders should care who's in charge. But Terry McAuliffe is special. This man has fabulous connections—he reeks of them—but party-building is not among his talents. He raises big bucks for the Clintons' personal debts and the presidential library, even offered to put up $1.35 million in earnest money for their mortgage. He was leading co-engineer of the 1996 fundraising scandals when Clinton blew out the gaskets on the campaign finance laws, when reformers plausibly argued that the "soft money" law (not to mention perjury laws) had been violated by the Clinton money machine. McAuliffe, furthermore, was named in court testimony by a former DNC finance director as the inside player who repeatedly promoted an illegal money swap between the Teamsters and party donors. Teamsters president Ron Carey, the supposed reformer, was tossed from office, two aides pleaded guilty and a third was convicted. McAuliffe's ascension should provide good grist for Senator John McCain's floor speeches on campaign finance reform.

Party leaders and rank-and-file activists should rise up in anger and reject Clinton's clever ploy, though there is little reason to hope they will do so. This deal is wired at the top. House minority leader Dick Gephardt was an usher at McAuliffe's wedding. Democratic Senate leader Tom Daschle bubbles up with praise. Leaders of organized labor are cozy with Terry, too. They do union business deals and pension-fund investments with him (including one Florida real estate project the Labor Department investigated because, according to the *Orlando Sentinel*, McAuliffe realized a $2.4 million profit without investing any money of his

In Fact . . .

PROGRESSIVES FRISK IN FRISCO

Tom Gallagher writes: They don't make routs much bigger than the one San Francisco Mayor Willie Brown and allies experienced on December 12. After the runoffs of the city's first district Board of Supervisors elections since the days of Harvey Milk and Dan White, Brown-backed candidates had lost nine of eleven seats to an insurgency built to a considerable extent on Tom Ammiano's remarkable 1999 write-in mayoral campaign and fueled by the widespread perception of a city for sale. While deputy public defender Matt Gonzalez increased his 44-to-28 percent preliminary edge to 66-to-34—despite switching from Democrat to Green in the interim—none of Brown's runoff candidates reached even 52 percent (one drew only 19 percent) despite an overwhelming soft-money advantage.

DEATH ROW SURVIVORS

Scattered through the text of Robert Sherrill's article in this issue are photographs of eight former Illinois death-row prisoners taken by Loren Santow, a Chicago-based, widely published freelance photographer. The photos of men wrongly condemned to death were taken for a poster conceived by Rob Warden, a writer and activist, to publicize the errors endemic to the system. Before the present moratorium and since the restoration of capital punishment in Illinois, twelve prisoners have been executed, and thirteen freed because of innocence or lack of evidence. See Death Row Roll Call on the *Nation* website (www.thenation.com/deathrow) for a list of inmates awaiting execution and links to register a protest.

NATION NOTES

We congratulate the following friends who were awarded the National Humanities Medal: Toni Morrison, editorial board member; Barbara Kingsolver, *Nation* cruise panelist; and Earl Shorris, contributor and founder of classics courses for the poor. And National Medal of the Arts winner Benny Carter, reader.

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COMMENT

own). Friendship trumps principle, especially when money makes the friends.

If McAuliffe gets the DNC job, he will be a living window on the party's cynicism. A few weeks ago, its nominee was promising to fight for "the people against the powerful." The election's over—hold that happy talk about "the people" until the next campaign.

WILLIAM GREIDER

William Greider is The Nation*'s national affairs correspondent.*

Return of Legal Realism

The most enduring debate among twentieth-century legal analysts has been that between "legal realists" and those who believe in a reasonably strong version of "the rule of law." Though legal realism was often caricatured as reducing law to what the judge ate for breakfast, what it was really about was attacking the notion of the majestic impersonality of the judge, who was above politics. As Felix Frankfurter once put it, "as judges we are neither Jew nor Gentile, neither Catholic nor agnostic [and, presumably, neither Democrat nor Republican]. We owe equal attachment to the Constitution and are equally bound by our judicial obligations." Such claims were derided by realists like Yale law professor Fred Rodell, who viewed judges as no more than politicians in robes using legalistic mumbo-jumbo to write their politics into law. The argument has proceeded apace into the twenty-first century.

Almost everyone has accepted what might be termed a "soft" legal realism, one articulated by Frankfurter himself when he wrote in 1930 that "the controlling conceptions of the justices are their 'idealized political pictures' of the existing social order." Thus it is a commonplace to refer to "conservative" and "liberal" wings of the Supreme Court as a shorthand reference to two quite different pictures painted by the two sides in cases involving race relations, the autonomy of states, the death penalty and the like. Though judges are "political," the politics are "high" rather than "low"; that is, decisions are based on ideology rather than a simple desire to help out one's political friends in the short run.

Thus the legal attack on racial gerrymandering led by "conservative" judges probably favors the interests of the Democratic Party, while its defense by "liberal" judges probably enhances the power of the Republican Party (because it "packs" overwhelmingly Democratic black voters into relatively few Congressional districts). Ideology seems to be a better explanation of the two positions than a desire to maximize the interests of one or the other party.

The Court's decision in *Bush v. Gore*, however, seems an exercise in low rather than high politics. How can one take seriously the majority's claims that their award of the presidency to Bush is based on their deep concern for safeguarding the fundamental values of equality? This majority has been infamous in recent years for relentlessly defending states' rights against the invocation of national legal or constitutional norms. *Bush v. Gore* is all too easily explainable as the decision by five conservative Republicans—at least two of whom are eager to retire and be replaced by Republicans nominated by a Republican President—to assure the triumph of a fellow Republican who might not become President if Florida were left to its own legal process.

Of course, a consistent realist might point to tension between the generally nationalist, equality-protecting positions taken by the dissenters and their esteem in *Bush v. Gore* for state autonomy and, concomitantly, for the different standards being applied in various county recounts. It is decidedly "unrealist" to denounce one group of judges as behaving politically while praising another for simply following the "rule of law." Rodell or any other hard-core realist would deride any praise of the Florida Supreme Court for its wisdom in construing the Florida statutes. Those judges, too, could easily be depicted as Democratic partisans manipulating the law to serve their political favorite, Al Gore.

Few Americans, however, and almost no law professors, embrace such a complete legal realism, even if they rightly accept its "softer," more ideologically oriented version. Full-scale realism leaves one without the ability to argue that legal arguments can be assessed by their conformity to norms that can be invoked, by judges and others, to discipline the vagaries of political choice. But a strong critique of the Court's opinion that presupposes that it indeed violated basic norms and "descended" into raw politics would violate the premise of an unabashedly "political" realism.

That "hard" realism has nihilistic overtones might explain why we resist it so strongly, but it does not constitute a genuine refutation of the position. It is a sign of the truly unprecedented nature of *Bush v. Gore* that many liberal law professors, who have spent much of their career asserting the reality of the rule of law (and of the Supreme Court as what Ronald Dworkin terms "the forum of principle," even if they sometimes disagree with particular principles enunciated by the Court), find themselves wondering if they can continue to do so. *Bush v. Gore* may have superficially resolved a short-run political crisis, but it has triggered the deepest intellectual crisis—at least for people who profess to take the law seriously—in decades.

SANFORD LEVINSON

Sanford Levinson is professor of law at the University of Texas.

CALVIN TRILLIN

WHAT MUST HAVE HAPPENED TO CREATE THE SUPREME COURT DECISION IN *BUSH V. GORE*

Though "activist" is what they've railed against,
These five Supremes said, "Just this once, let's
try it.
We know which candidate we want to win.
We'll simply find some law to justify it."

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THE INDICATORS / DOUG HENWOOD

Spreading the Wealth

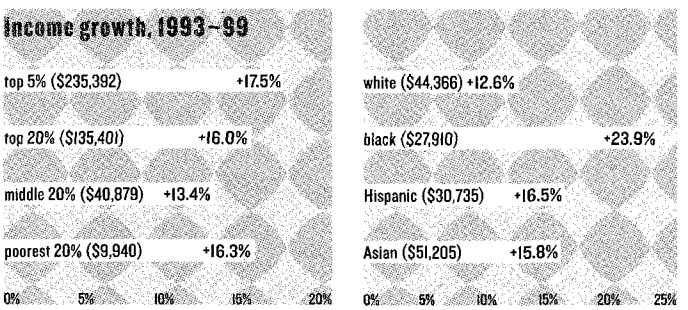
In early October the Census Bureau released its estimates of income and poverty in the United States for 1999. They showed continued strong income gains across the board and sharp drops in poverty. Several years of sustained low unemployment and good economic growth have done the trick: After two decades in which only the rich saw significant real income gains, the masses too are enjoying the boom years. There's lots of lost ground to make up—and whether this will last is anyone's guess, though recent signs of a slowdown aren't encouraging—but good times have been rolling.

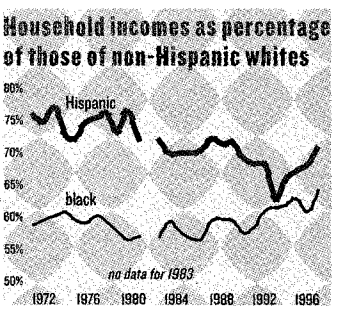
Questions or suggestions? dhenwood@panix.com.

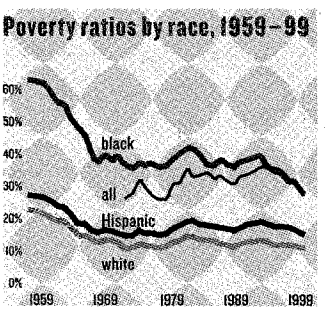
Income up, poverty down...

SINCE THE ECONOMY REALLY TOOK OFF IN 1993, households of all classes and colors have seen strong income gains. Income growth among nonwhite households has been stronger than among whites, narrowing the classic racial/ethnic gaps. Poverty rates are also down, with the black poverty rate the lowest on record and the Hispanic rate near a record low. Yes, poverty is still too high (and the official measure seriously understates matters), the income gaps are too wide and the 2 million behind bars are excluded from the counts—but there's some good news here.

Sources: Census Bureau's historical income and poverty web pages, www.census.gov/hhes/www/income.html and www.census.gov/hhes/www/poverty.html, respectively. Bureau of Labor Statistics (www.bls.gov/cesbtabs.htm).





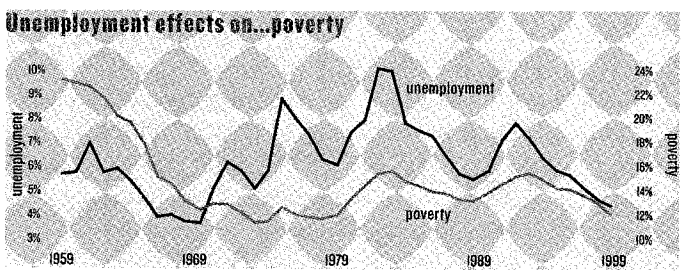


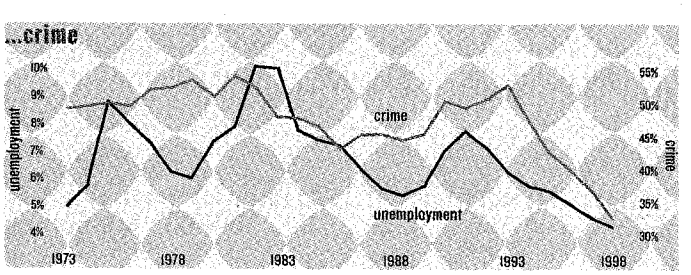
Tight labor markets are good

THE MAJOR REASON FOR THE DECLINE in poverty is the decline in unemployment; note how the two lines in the chart below move in parallel. The poverty-reducing effect of falling unemployment isn't as strong as it once was; compare 1979, 1989 and 1999, for example. But there's no doubt about the trend.

It's not only in the economic realm that low unemployment has good effects. Take, for example, the fall in the crime rate (here shown as the number of violent crimes per 100,000 adults). Mainstream sources like to celebrate severe policing and rampant jailing, but a strong job market is a more humane approach.

Sources: Census Bureau's historical income and poverty web pages, www.census.gov/hhes/www/income.html and www.census.gov/hhes/www/poverty.html, respectively. Bureau of Justice Statistics victimization survey (www.ojp.usdoj.gov/bjs/glance/viort.htm).



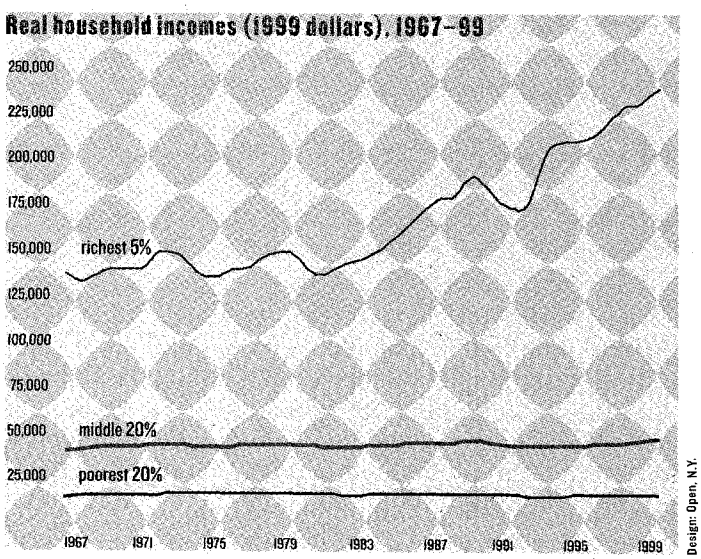


Much more of this is needed

LEST WE GET CARRIED AWAY WITH ALL THE GOOD NEWS, a little perspective: Recent gains for low- and middle-income households don't look so impressive next to the previous 20 years of stagnation, nor do they look so impressive next to the upward trajectory of the rich.

Which is why we need at least 20 years more of sub-5% unemployment. By keeping interest rates high as the economy slows, the Federal Reserve is working against this noble goal.

Source: Bureau of Labor Statistics (www.bls.gov/cesbtabs.htm).



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ALEXANDER COCKBURN

Let's Get Our Show on the Road!

The last time I had fun at a counter-Inaugural was when Nixon was sworn in, on January 20, 1973. As he launched his second term with the traditional piece of perjury about upholding the law, we all looked forward to four more years, but of course Nixon was gone in less than two, which proves yet again it's always a mistake to lower one's expectations.

No one has ever said that Nixon didn't win the popular vote and the Electoral College fair and square in 1972. He came by his victory at the polls honestly enough, unlike George W. Bush, with his prime-time coup d'état. Watergate seeped out slowly over two years, amid just the same sort of cries from Republicans and most of the press for "closure" (i.e., letting Nixon off the hook) as we've just endured. There should be some formal, legally based venue now in which evidence about the stolen election can steadily pile up, day by day. Even as I type these words, St. Clair sends me a news story from the *Orlando Sentinel*, starting as follows:

> TAVARES—An inspection of more than 6,000 discarded presidential ballots in Lake County on Monday revealed that Vice President Al Gore lost a net 130 votes that were clearly his even in a conservative, GOP bastion.

What an opportunity for the radicals, the Greens, our crowd by any useful name! A stolen election, wrought by expedients so coarsely apparent that the only thing the respectable opinion-formers can do is avert their eyes and call for "closure." And better yet, the Democratic Party is as eager as the Republicans to change the subject from the poll-rigging and abuse of minority rights in Florida.

I wish Ralph Nader had been, over the past few weeks, as vociferous as Jesse Jackson, who is now calling for a series of voter-registration rallies across the country, January 15–19, with the theme of "Count the Vote—Every Vote Counts."

Maybe I've missed them, but I've seen no reports of Nader holding rallies and press conferences to emphasize that the entire saga of the stolen election proves his fundamental point this year about the utter corruption of the two-party system. (The Democrats, like other parties with more revolutionary pretensions than theirs, have made it consistent policy to imprison the party's most loyal supporters. The prison and jail population in Clinton-time has ballooned to more than 2 million. Count how many lost votes that meant for the party last November 7.)

I fear that Nader is stuck in a defensive posture, dealing with all those accusations that he spoiled things for Gore. Let's just stipulate that he did, that he was correct in so doing and that now it's time to move on and start setting our agenda for the next four years. No one attacks the Democratic Leadership Council for denying Gore the presidency, though the gutless campaign run by two of its members, Gore and Lieberman, can in vast measure be ascribed to this same repellent council.

And yet here's the DLC hastening forward with the claim that Gore lost because he wasn't *enough* of a DLC-er, had become a "populist" and betrayed the council's pro-corporate posture. But hold! Wasn't it the DLC's strategy to win back the South with attacks on welfare and so forth? As we all know, the only Southern state Gore won was Florida, not because of the DLC but by reason of the usual progressive constituencies of blacks (or at least those who surmounted the fearsome obstacles of voting-while-black in Florida), Jews and snowbirds from the Rustbelt.

Nader should take comfort from the DLC's chutzpah and start rallying and inspiring the green legions, who are eager to get on with things and who, to judge by the ones I've talked to, don't feel in the least defensive in the face of charges that they sabotaged the Prince of Tennessee. The counter-Inaugural, for which outfits like the New York–based International Action Center are already busily organizing (www.iacenter.org), is obviously one opportunity, perhaps with some sort of conference either to coincide with it or to occur not long thereafter.

The conduct of the Supreme Court obviously offers another opportunity to underline the corruption of the judiciary, another theme I would assume to be dear to Nader's heart. There's a strong case to be made for the impeachment of both Justices Scalia and Thomas, on grounds of failure to recuse themselves even though family members were part of or close to the Bush campaign.

A legal action to remove Thomas from the Supreme Court bench on simple grounds of incompetence also surely has a future. Here's a man who managed to get through two of the most momentous hearings in the history of the Court without asking a single question. On December 17 Courtland Milloy had a devastating piece in the *Washington Post* about Thomas's ghastly performance in front of a group of high school students, recorded in a C-SPAN forum. The encounter was the day after Thomas had voted with four other Justices to shut down the Florida count.

> Thomas was asked why he rarely asks questions from the bench. "Oh, boy, that's a good question," Thomas replied. His answer, however, was not good at all. "When I was 16," Thomas said, "I was sitting as the only black kid in my class, and I had grown up speaking a kind of dialect. It's called Geechee. But some people call it Gullah now, and people praise it now. But they used to make fun of us back then.... And the problem was that I would correct myself mid-sentence. I was trying to speak standard English. I was thinking in standard English but speaking another language. So I learned that—I just started developing the habit of listening."
>
> Here was a grown man, a member of the highest court in the nation, telling students that he doesn't ask questions because he got his feelings hurt back in high school.

The kids were evidently unimpressed. "Justice Thomas," one of them asked, "how does the Court handle a Justice that has become mentally incapable of serving the court?" "Hopefully, that doesn't happen here," Thomas replied. "But there are statutory provisions for that." Hear! Hear! ■

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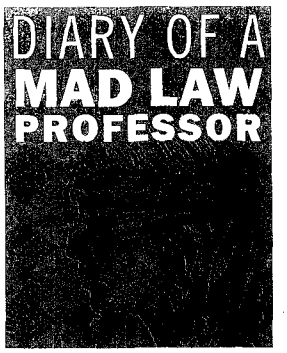
PATRICIA J. WILLIAMS

Dear Virginia



Dear Virginia,

Thanks so much for your sweet letter, but it is my sad duty to inform you that Santa passed on last month, his spirit rising to the great sleigh in the sky, then he was gone forever. It was quite a year up at the North Pole, what with the ozone and the icecap and the flood of ecotourism. And when the elves went off to work on the oil rigs, I think it was just too much for his old heart to take. To say nothing of his lungs: All that chimney particulate finally took its toll.

Anyway, my dear, the hard times had cost us in other ways too: I suppose you should know Santa left me just two days short of our millennial anniversary and took up with that notorious little housewrecker, Tinker Bell. Let's just say she grew up a whole lot faster than poor, clueless Peter Pan. What's worse, Santa left her the whole of Candyland, citing her part in what he described as the ten jolliest months of his life.

It broke my heart, I can tell you, but I do believe he was not in his right mind at the end—fairydust, the vixen. I plan to sue and am looking for a good lawyer, someone really devious because the polar court system is a bit of a joke. After all, we've never had to deal with real life way up here before. The original court was designed for theatrical functions only, and the judge was rescued from a puppet production of Gilbert and Sullivan's comic operettas—you can tell by the gaudy gold stripes on his robes and the way he keeps humming: "Though all my law be fudge,/Yet I'll never, never budge,/But I'll live and die a judge." Anyway, you asked after the old-timers, most of whom have moved on or passed on. Bambi wandered into Scarsdale and was made an example of by the local zoning board. Billy Badger disappeared beneath a shopping mall. Eager Beaver met up with a drunk on Jet Skis.

On the brighter side, Chicken Little is doing Larry King after all those years of being dismissed as paranoid and fluffy. Who knew she had a degree in atmospheric studies? Jack Sprat wrote a diet book called *Living on Air*, and his wife wrote a cookbook called *Goodies to Die For*. And so between them both, they have spots on Oprah every other week. Loosey Goosey is a reporter for the Foxy Network. She always did believe everything she heard, but now that there's a market for it, she's sitting pretty. Punch and Judy have updated their act and have a regular gig doing political commentary for *Hardball*.

Baby Bear left the forest and moved to Manhattan, where he's an investment adviser to the Internet industry. He married that hungry Goldilocks woman, and his parents are just heartbroken. Cock Robin succumbed to the West Nile plague, but not before being accidentally baked in a pie along with four and twenty infected blackbirds. The pie was served to Solomon Grundy, who took ill on a Thursday, was turned down by his HMO on Friday, died on Saturday, was buried on Sunday. The EPA was asked to investigate, but before a report could be issued, the agency's three remaining wise men put out to sea in a bowl, under very suspicious circumstances. Their jobs were filled by three blind mice, and it's been all downhill since then. Industry wolves have been huffing and puffing and getting their way.

They finally put old Humpty Dumpty back together again, added a few shell-enhancing hormones and pumped him so full of antibiotics that all it would take would be one good resistant bacterial strain to kill him and all the other good eggs on the planet. The Old Woman Who Lives in a Shoe is 700 years old these days, but thanks to the over-the-counter fertility pill they just approved, she still has so many children she doesn't know what to do. Meanwhile, poor Baba Black Sheep says she was force-fed a new sterility pill because she hadn't any wool. And I don't know if you ever met Little Dolly Lamb—the one whose fleece was white as snow? Turns out scientists were able to enhance her standardized-test-taking ability so significantly that she followed some little girl named Mary to school one day, enrolled and then graduated at the top of the class before Mary could so much as learn her ABCs. They've been cloning her like mad.

Through the miracle of the same technology, Little Boy Blue was able to beef up his business by literally putting cows in the corn. Corned-beef-on-the-cob seemed like a good idea at first, but now all kinds of things have leaped the species barrier, and mad corn disease has been spreading throughout Storyland. Thus far they have had to destroy a billion big bottomless barrels of barley, a million mounds of moldering millet, seventy-six secret sources of seriously soured soy, hundreds of hidden holdings of hacked and hindered hay, and a plethora of prematurely prepaid pots, parcels and pecks of partly pickled peppers that Peter Piper picked.

Jack's beanstalk is still hardy though, as are all unnatural things. Two of my brothers over the sea each recently sent a present to me: The first sent a chicken without any bones; the second, a cherry without any stones. And Mistress Mary's garden, which was quite contrary under the best of circumstances, is now just chock-full of weird pesticidal silver bells, fly-swallowing cockleshells and pretty maids snapping at dragonflies all in a row.

On other fronts, the loss of faith in fairy tales has taken a terrible toll. Br'er Rabbit turned into a sad cabbage junkie and was last seen braised, with a shallot, tarragon and champagne vinegar reduction. Tom-Tom the piper's son stole one too many pigs and, thanks to the new three-pigs-and-you're-out law, is doing life in Sing-a-Ling. Br'er Fox, on the other hand, claims to have given up terrorizing chickens, even hired two of them as his bodyguards, the sly old coot. He's running the barnyard these days. It's hard to believe, I know, but even Farmer Brown has appeared on television to extend the hand of reconciliation, insisting that Br'er Fox is most worthy of our trust.

It's good to know you're still holding a candle, my dear Virginia. But don't let that milk and cookies go to waste. Buy some videos. Join a chatroom. And if you hear someone climbing down the chimney, light a fire. ■

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ERIC ALTERMAN

Let the Whitewash Begin

Historians are fond of quoting Lionel Trilling's famous observation that the United States lacks a conservative intellectual tradition and that this vacuum has weakened liberalism, encouraging intellectual smugness and flaccidity for want of a worthy challenge. If Trilling was right, then liberals are in for some lean years indeed. Never has the moral and intellectual bankruptcy of conservative intellectuals been on more prominent display than in the wake of the decision by five Supreme Court Justices to end the 2000 election in favor of their man. So muddled were the Justices' arguments, historian Alan Brinkley noted, that not one of them "command[ed] a majority even of the Court itself."

In embarking on this course in the dead of our political night, Rehnquist, Scalia and their fellow ideologues managed to sever one of the few nonpartisan links between the governed and the governing in our democracy. Witness the rare combination of outrage and sense of personal betrayal on the part of so many of the independent judiciary's most eloquent and devoted defenders—not only Alan Brinkley but writers like E.J. Dionne of the *Washington Post*, author/attorney Scott Turow, Jeffrey Rosen of *The New Republic*, Terrance Sandalow, the conservative former dean of the University of Michigan Law School, and Linda Greenhouse and Anthony Lewis of the *New York Times*, among others. The language of each of those writers, who variously termed the majority decision "grotesque" (Dionne), "judicial lawlessness" (Turow), a "disgrace" (Rosen), "incomprehensible" and "without any foundation in law" (Sandalow), "baffling" (Greenhouse) and a "rush to judgment [with] no credible explanation" (Lewis), serves as a warning that the Court's damage to itself and to our political system may very well outlast any damage "W" might be capable of inflicting on the Republic.

Now, even to discuss the merit of the Court's decision rationally, one must first grant its historic significance: A narrow 5-to-4 majority agreed to prevent a count of all potentially legal ballots in order to insure its man's ability to run out the clock on an arbitrarily imposed deadline. Yet in the world of conservative punditry, the Court's historic election-ending sleight-of-hand was somehow beside the point. 7-2, IT'S OVER, was the deliberately misleading headline above a dishonest *Wall Street Journal* editorial the next morning. The Court, it reported, had allegedly "decided 7 to 2 that the Florida Supreme Court's intervention violated the Constitution of the United States. The High Court ruled that the varying standards of assigning ballot wins, on view to the entire nation for a month, could not pass Constitutional muster." Even with a full day to sort matters out, William Safire could do no better. Writing beneath a Washington dateline but filing as if on Mars, the *Times* pundit somehow reported that "the whole Court did itself proud"; its alleged "7-to-2 agreement" represented "the product of fine legal minds thinking fast, unafraid of complexity, unsullied by rancor." *Washington Post* hatchet man Michael Kelly joined in this macarena of meretricious mendacity. Forget the 5-to-4 split ending the election, he advised. "The heart of the court's decision is not found in the fact that five conservative justices ruled to reverse the split decision rendered by four liberal justices on the Florida Supreme Court. The heart is found in two sentences from the majority decision: 'Seven justices of the court agree that there are constitutional problems with the recount ordered by the Florida Supreme Court.... The only disagreement is as to the remedy.'" Thus did the renegade Justices "rescue democracy" in Mr. Kelly's universe.

The intellectual dishonesty of these statements is so transparent that, *pace* Lionel Trilling, it embarrasses this liberal to have to point it out. To a man, these pundits attempt to attribute to the dissenters beliefs each one specifically rejected in some of the most unvarnished language ever to emanate from the bench. Could Steven Breyer possibly have been any clearer than to write of the Court's decision, "What it does today the Court should have left undone"? And should David Souter, the seventh member of the conservatives' alleged majority, have used smaller words when writing, "There is no justification for denying the state the opportunity to try to count all disputed ballots now"? Should the Justices have published their dissents in Braille? Broadcast them on Rush Limbaugh or the *Drudge Report*?

Well, never mind. If there is one sure bet in American politics, it's historical amnesia. Soon the machinations of James Baker, Jeb Bush, Katherine Harris, Tom DeLay and their allies inside the violent mobs of Miami and the velvet robes of the nation's capital will evaporate into the endangered ozone layer. Al Gore has already brilliantly played his assigned role in the new chapter, moving Chris Matthews almost to tears by giving, "beautifully," what the hysterical MSNBC pundit celebrated as "the most prostrate concession speech I've ever heard."

"The vast majority of the people in America," Tim Russert advised, want to wake up and say, "You know, we went through something extraordinary and yet we saw last night the peaceful transfer of power—no troops in the street, no tanks rolling down Pennsylvania Avenue...." Well, if the absence of soldiers seizing cable networks is the ultimate standard of meaningful democratic empowerment, then Russert is right, we're not doing half bad; not up to the standards of, say, the Grecians, but we sure beat the heck out of the Kosovars.

In closing, I leave you with the wise words of *Weekly Standard* editor William Kristol, who was turned into an accidental prophet by virtue of his magazine's inopportune deadline. Our next President, Kristol wrote, "gained office through an act of judicial usurpation. We will not 'move on.' Indeed, some of us will work for the next four years to correct this affront to our constitutional order.... The best that can be hoped for under such circumstances is that this illegitimately gained presidency will give rise to a determination on the part of the people to resume the burden and the privileges of self-government." ■

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ARTICLES

DEATH TRIP

THE AMERICAN WAY OF EXECUTION by ROBERT SHERRILL

"Capital punishment is to the rest of all law as surrealism is to realism. It destroys the logic of the profession."
Norman Mailer, *The Executioner's Song*

If you tried to sell death-penalty stock on Wall Street, the Securities and Exchange Commission would have you prosecuted for fraud. Capital punishment doesn't achieve any of the things its backers promise it will, and it is a spectacular waste of time and money.

Among the major Western nations, the United States has for a long while been alone in punishing murderers with some form of execution. Why do we hang on to the penalty? For one thing, we're suckered by our politicians into thinking we're more bloodthirsty than we really are. But also, maybe we're still addicted to the religious fundamentalism (Old Testament approval of lethal vengeance) that's been a part of our social thinking since colonial days. Or maybe we still feel a residual pull to the savage entertainment (bare-knuckle boxing, eye-gouging wrestling, eight-inch-knife fights à la Jim Bowie) of frontier days.

Capital punishment fits right in with those entertainments. But why has the job of running this grisly circus been turned over to such knuckleheads? Americans are supposed to be scientifically proficient, and electricity and deadly chemicals have certainly been around long enough for us to get the hang of using them. But time after time our brilliant executioners have messed up. Michael Radelet, an authority on capital punishment, has compiled a list of thirty-two botched executions since 1982. These from Florida will give you an idea of why they don't allow the public to attend.

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When Jesse Joseph Tafero was electrocuted in 1990, witnesses said footlong blue and orange flames shot from the right side of his bobbing head. It took four minutes and three 2,000-volt jolts to finish him off (later, evidence came to light indicating he was innocent of murder). When Pedro Medina was electrocuted in 1997, it happened again. Flames from his head. When the execution was finished, the fire was patted out by a maintenance supervisor wearing asbestos gloves. Another official opened a window to disperse the smoke in the execution chamber. State officials decided it was time to retire "Old Sparky," as they fondly called the chair, and build a new one. Allen Lee Davis was the first to sit in it, last year. The executioner pulled the switch and blood poured from Davis's mouth. OK, that did it. It was time for something new to improve appearances. Florida would try poison. On June 8, 2000, Bennie Demps lay on the gurney while technicians struggled for thirty-three minutes to get the needle into four veins in three places. Demps shouted into the microphone dangling over his head: "They butchered me back there. I was in a lot of pain. They cut me in the groin, they cut me in the leg. I was bleeding profusely." The warden of the penitentiary claimed Demps was just "griping." What a bad sport.

When you come right down to it, these botched executions are merely sideshows and beside the point. Someday the penal folks will probably manage to get all the kinks in the execution process smoothed out and they'll be able to kill without a lot of flames and needle-jabbing. But the big question will remain: Why do we want this circus anyway?

Maybe We're Not So Heartless

It's true that polls usually show that Americans back the death penalty, 2 to 1. But it hasn't always been that way. In part of the 1950s and much of the 1960s, a majority of Americans said they opposed capital punishment, and in 1968 the US Supreme Court regarded death-penalty supporters as a "distinct and dwindling minority." They might have continued to dwindle if Republicans—Richard Nixon seeking the presidency in 1968 and Ronald Reagan seeking the California governorship in 1972—had not ignited the penalty as a national campaign issue. And the pro-death mob really got worked up (moving approval for the penalty toward 80 percent) after Willie Horton was thrown onto the fire in the elder George Bush's 1988 presidential campaign.

But now support for the penalty is moderating. Several polls, including a recent one by Gallup, show that when people are asked if they would prefer to have murderers sentenced to death or to life without possibility of parole, opinion splits, 50-50. And some polls show death losing. A *Wall Street Journal* poll in July found that because of the doubts that DNA testing had raised about the accuracy of some sentences, 63 percent favored suspending the penalty until questions of its fairness could be fully studied. Even without further testing, 42 percent said they thought the penalty was unfair (the same percentage thought it was fair; the rest said they weren't sure).

The kinder polls result from growing awareness that innocent people are probably being executed. After all, eighty-nine people have been released from death row since 1973 because evidence of their innocence has emerged—thirty-eight since 1993. Some of the innocent ones among the thousands now waiting for execution simply won't have that kind of luck.

Geographically, the popularity of executions seems extremely limited. Thirty-one states have used the death penalty in the past quarter-century, but six states account for two-thirds of the executions, and ten states account for 82 percent. Texas alone accounts for more than one-third. Of the eighty-four executions in the nation this year, forty, or almost half, were in Texas—the largest number of executions in any one year in any state in the nation's history. But wait. Look at what's happening nationally. Executions are down 14 percent from the ninety-eight in 1999, and the Justice Department's latest figures for people sentenced to die in 1999 are significantly below the average for the past five years (272 versus 300).

Killing for Votes

The death penalty seems to be a kind of gruesome flypaper that ambitious politicians get stuck on. Bill Clinton, for example. No Republican was going to out-tough him. Running for President in 1992, then-Governor Clinton interrupted his New Hampshire campaign to return to Arkansas and preside over the execution of Rickey Ray Rector, a black man sentenced to death by an all-white jury for killing a cop. After shooting the cop he tried to commit suicide but succeeded only in performing a lobotomy on himself, thereby becoming so mentally retarded he didn't know what an execution was. He saved a piece of pie from his last meal because he thought he was coming back to his cell.

In 1994, with much publicity, Clinton signed an act expanding the federal death penalty to cover sixty crimes, including three that don't involve murder. Two years later, another election year, he signed the Antiterrorism and Effective Death Penalty Act, which makes it much, much harder for murder defendants to have their habeas corpus appeals—their claims of unfair, unconstitutional trials—heard in federal courts. These actions were featured in his first three re-election campaign ads on TV.

But George W. Bush has exploited the death penalty even more lavishly than Clinton. Texas has executed 239 since the Supreme Court revived the death penalty a quarter-century ago, and more than half (152) were executed after Bush became governor in 1995; his execution chamber has been by far the most active in the nation, killing an average of one prisoner every two weeks. One of Bush's first acts as governor was to reject the clemency plea for Mario Marquez, whose severe brain damage left him with an IQ of 60 and the skills of a 7-year-old. Although the Texas Senate is very conservative, it passed a bill to bar the execution of profoundly retarded prisoners; the House was about to approve it, too, when Bush blocked further action by saying, "I like the law the way it is right now." In an interview shortly before the execution of born-again Christian Karla Faye Tucker in 1998, he was said to have mimicked her plea for mercy. During his presidential campaign reporters asked him if he was bothered that some indigents on Texas's death row had been represented by lawyers who slept though part of their trials; he responded with a chuckle. In his first year as governor, George W. easily persuaded the legislature to shorten the process for death-penalty

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appeals. This program of speedy executions has been adopted as a model by brother Jeb, Governor of Florida, who got his Republican legislature to pass a shorter appeals process. Brad Thomas, Jeb's top adviser on capital punishment, told the *St. Petersburg Times*, "What I hope is that we become more like Texas. Bring in the witnesses, put them on a gurney and let's rock and roll."

The really pervasive political use of executions is right down at the grassroots. In most states with the death sentence, judges are elected. This includes state Supreme Court justices. And if they help overturn even one death sentence (as Justice Penny White, a Democrat, learned in Tennessee) their political opponents will run them off the bench by charging them with "favoring the rights of criminals over the rights of victims." The most famous exhibition of this sort was in California in the days when Chief Justice Rose Bird and her allies on the bench reversed sixty-six of the sixty-eight death sentences they reviewed. A Republican crusade swept them out of office. Particularly in the South, some judges and attorneys general campaign like Savonarola. Many may justifiably campaign that way because they had previously been prosecuting attorneys who, in highly publicized trials, sent many a criminal to his grave. Charlie Condon became South Carolina's attorney general in 1994 by reminding voters that he had put eleven men on death row.

Steven Smith: sentenced to death August 1986, freed February 1999

LOREN SANTOW/IMPACT VISUALS

Never Trust a Prosecutor

Misconduct abounds. Prosecutors who bully, lie and misuse or hide evidence are as common as baseball players who chew gum. In all the most active capital-punishment states, prosecutors often build their cases by hiding evidence and using jailhouse snitches eager to lie in return for lower sentences for themselves. They also rely on junk science, such as the widely discredited use of hair comparisons as forensic evidence. And then there are the psychiatrists. In Texas the death penalty cannot be imposed unless the jury unanimously agrees that if turned loose the defendant would likely kill again. Prosecutors know which psychiatrists—"killer shrinks," critics call them—are most useful. One of their favorites is Dr. James Grigson, who has examined hundreds of capital defendants and predicted 80 percent would be forever dangerous. Randall Dale Adams, accused of killing a Dallas policeman, was sentenced to death after Dr. Grigson testified that he was an "extreme sociopath" and that there was "about a one thousand percent" chance he would always be a threat to society. (After the documentary *The Thin Blue Line* focused on prosecutorial misconduct in Adams's case, he was released from prison, having served twelve years. Adams is now married, employed and living a nonviolent life.) In 1995 the American Psychiatric Association—which has found that two out of three predictions of long-term future dangerousness are incorrect—expelled Grigson for what it considered extravagantly untrustworthy courtroom testimony in a number of cases. He said the APA is "a bunch of liberals who think queers are normal." Texas prosecutors continue to use him. They also use the testimony about dangerousness from psychiatrists who have never even talked to the prisoner in question.

And the Texas Department of Criminal Justice's chief psychologist helped send nine men to death row by arguing that they were a future menace to society because they were Hispanic or black.

A majority of the justices on Illinois's Supreme Court said capital punishment is unconstitutional because it allows politically ambitious prosecutors too much discretion in choosing whether to seek that penalty.

Example: Among the dozen men freed from Illinois's death row in recent years are Rolando Cruz and Alejandro Hernandez, who were convicted in 1985 of the abduction-rape-murder of 10-year-old Jeanine Nicarico in 1983. With the local prosecutor up for re-election in three weeks, the police, under intense pressure to make arrests for the girl's murder, acted on an anonymous phone tip (or so they said) and scooped up Cruz and Hernandez. Not long after their first conviction, a repeat sex offender and murderer, Brian Dugan, confessed to six rape-murders, including Nicarico's. The prosecutor paid no attention to Dugan's confession and continued to pursue Cruz and Hernandez when they won new trials on the old charge. This time Hernandez got only eighty years, while Cruz went back to death row. And there they stayed until—ten years, six months and eighteen days after they first entered prison—they were cleared by a DNA test and a cop's confession at Cruz's third trial that he had supplied the original lie that convicted them in the first place.

Because they are so eager to make their reputations in murder trials, prosecutors will launch them even with very weak evidence, which is one reason they lose about 30 percent of capital trials, compared with about 15 percent of other felony trials. And some prosecutors will spend any amount of money and time rather than admit they are wrong. The premier example is the ordeal of Darby Tillis and Perry Cobb. They were tried five times—the most of any defendants in US history—for a Chicago murder. The five trials included three hung juries and a conviction—eventually reversed

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by the Illinois Supreme Court because of the conduct of the trial judge, who was later convicted of taking bribes. Finally, at their fifth trial, they were acquitted.

Before that, they had spent six years on death row.

Keeping the Public Stupid

Death rows and prison cemeteries are full of men and women who wouldn't be there if their trial juries had been aware of the alternative sentences offered by the state in which the murder was committed. Surveys have found that most people eligible for jury duty would be willing—indeed would prefer—to give first-degree murderers less than the death penalty if the substitute penalty were absolutely guaranteed to keep the killer behind bars a very long time or, if he is particularly dangerous, for the rest of his life.

The trouble is, many jury members have no faith that this will happen. Scare stories have convinced them the "system" is little better than a revolving door and that killers who aren't executed will be back on the street long before their prescribed sentence is up. A few years ago, a small army of academics known as the Capital Jury Project and funded by the National Science Foundation interviewed nearly a thousand jurors who had served in capital trials in eleven states. They found that most had done their jury service without having the foggiest notion of their states' penalty laws, which in fact offered quite a variety of penalty choices. Some of the interviews were done in states where the law specifically requires "lifers" to serve at least twenty-five to forty years before being eligible for parole, and where the worst killers can be sentenced to honest-to-god LWOP—life without parole.

Many prosecutors and tough-on-crime legislators have done their best to keep juries ignorant, for if they don't know the alternative sentences, they will more likely vote for death, just to be safe. Attorney J. Mark Lane, in a study of 280 Georgia death cases, found that during one-fourth of the sentencing deliberations, juries asked the judges what chances of early parole went with certain sentences. When they got no answer, most quickly voted for death. Here's Lane's description of one episode:

> The jury first sent the judge two questions: "Can we give the sentence of life without chance of parole? If no, when will the defendant be eligible for parole?" The judge replied that he was "not permitted to answer either of these two questions." The jury, after deliberating further, reported that it had reached a unanimous verdict: "We recommend mercy or that defendant's punishment be life imprisonment with the stipulation that it be life imprisonment without parole."

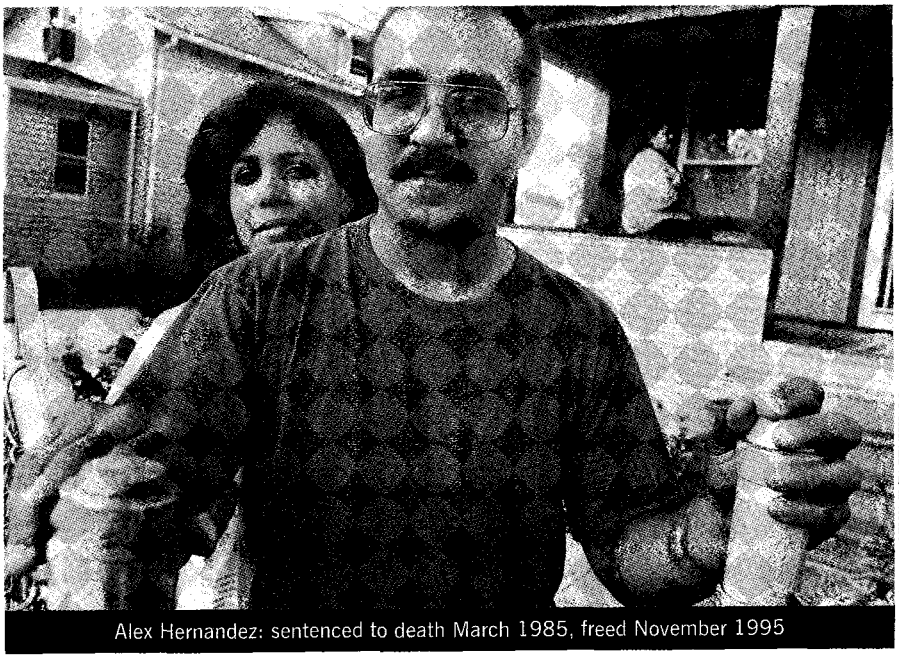
The judge said he couldn't accept that sentence because it wasn't in Georgia's law. He ordered them to go back and try again. Exhausted from floundering around without guidance, the jury imposed the death penalty.

Of course, many murders are so awful that juries aren't satisfied with any term that would include a chance for parole. For these juries LWOP would be the only tempting alternative, and thirty-three of the thirty-eight capital-punishment states now offer it. Of the five holdouts, Texas is by far the most stubborn, and its opponents are not shy about their reasons. In Harris County (Houston), District Attorney John Holmes Jr. said, "When you start passing throw-away-the-key bills, you're effectively eliminating the death penalty." And that wouldn't be popular at all in his county. It is by far the most bountiful supplier of candidates for execution in Texas.

A Strange Investment for a Capitalist Country

What does the public get from this sorry charade? It gets the bill. Hayseeds and urbanites alike are taken to the cleaners. The Judicial Conference of the United States estimates that the defense cost alone (and since virtually all defendants are penniless, the taxpayer picks up the tab) is four times higher in death-penalty cases than in cases where death isn't sought. And prosecution costs are 67 percent higher than defense costs. The cost of running a Supreme Court in a big state is enormous, and the Supreme Courts in states like California and Texas will spend more than half their time sorting through death-row appeals. Then there are the construction costs of making death rows extra secure, salaries for special guards and the cost of special recreation areas, etc.

The *New York Times* recently interviewed officials in the twelve states that have no death penalty; all were delighted not to be bogged down in the expensive swamp. The press in other states reports cries of pain. The *Sacramento Bee* estimates that California's bill for processing death-penalty cases between 1977 and 1993 came to $1 billion—although only two people were executed during that time. The *Dallas Morning News* figures that sending a killer to death row costs an average of $2.3 million, or about three times the cost of imprisoning someone in a single cell at the highest security level for forty years (forty years is the stiffest sentence available in Texas,



LOREN SANTOW/IMPACT VISUALS

Alex Hernandez: sentenced to death March 1985, freed November 1995

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A Talk With Governor George Ryan

If you sent to central casting for a Midwestern conservative, they'd send back Governor George Ryan of Illinois. With his white hair, plain business suit and heartland directness, Ryan is nobody's image of a crusading criminal-justice reformer. Not even his own. "I mean, I am a Republican pharmacist from Kankakee. All of a sudden I've got gays and lesbians by my side. African-Americans. Senators from Italy, groups from around the world. It's a little surprising."

A year ago in January, Ryan took a step unprecedented in the history of American capital punishment: He issued an open-ended moratorium on executions in Illinois. The immediate impetus: the exoneration of thirteen death-row inmates. Ryan's predecessor, Governor Jim Edgar, called those exonerations proof that "the system works." Ryan saw something different.

Ryan's moratorium received international attention, but his journey to that decision remained a largely private matter. He did not make the decision in a vacuum—legislators, lawyers and the media played a big role—but what led him to break so definitively with the bipartisan pro-execution consensus, and where his thinking has gone since, strikes at the core of the shifting politics of death.

Ryan, whose family owned several neighborhood drugstores in Kankakee for forty years, joined the Illinois legislature in the 1970s as a staunch law-and-order man. "I believed some crimes were so heinous that the only proper way of protecting society was execution. I saw a nation in the grip of increasing crime rates; and tough sentences, more jails, the death penalty—that was good government." In 1977, after the Supreme Court lifted its ban on execution, a bill to reinstate the death penalty came before the Statehouse in Springfield. When an anti-death-penalty legislator asked his colleagues to consider whether they personally would be willing to throw the switch, Ryan rose to his feet with "unequivocal words of support" for execution—words he now regrets. The truth, though, was that Ryan never thought about capital punishment much, before that vote or for more than twenty years afterward, except as an abstract idea of justice. "I supported the death penalty, I believed in the death penalty, I voted for the death penalty."

In September 1998, as Ryan was running for governor, an Illinois inmate named Anthony Porter, a man with an IQ of 51, was scheduled to die for a 1982 murder. Two days before Porter's execution date his lawyers won a temporary reprieve. Northwestern University journalism professor David Protess turned his investigative-reporting students loose on the case, and by February the evidence they obtained left the newly inaugurated Governor Ryan reeling: a videotaped confession by the real killer, freeing Porter after eighteen years. "I was caught completely off-guard. Maybe I shouldn't have been, but I was. That mentally retarded man came within two days of execution, and but for those students Anthony Porter would have been dead and buried. I felt jolted into re-examining everything I believed in." At first, a conflicted Ryan waffled on a full-fledged review of Illinois's capital apparatus, but ultimately he endorsed one concrete initiative: an $18 million capital-crimes-litigation fund to insure that defendants like Porter, as well as prosecutors, have access to investigative resources.

That experience also collided, within weeks, with a gubernatorial responsibility Ryan himself had helped enact: signing off on an execution. In the spring of 1999 the case of Andrew Kokoraleis landed on Ryan's desk. Kokoraleis had been found guilty of the rape, mutilation and murder of a 21-year-old woman. "This was a horrible crime, and I am the father of five daughters. But after the mistakes the system had made with Porter, I wasn't sure what to do. I agonized. I checked and double-checked and triple-checked the facts." In the end Ryan went through with it, and Kokoraleis was executed. But, says Ryan, "it was the most emotional experience I have ever been through in my life. It all came down to me—the one fellow who has to pull the switch. Quite frankly, that is too much to ask of one person."

Within three months, two more Illinois death-row inmates were exonerated: one by DNA evidence, the other when a jailhouse informant's testimony was discredited. The state judiciary began its own investigation, and the calls for a moratorium grew. Still, "I was resisting." But one day "the attorney general called seeking a new execution date for an inmate. In my heart at that moment, I couldn't go forward with it." Political cynics wondered if Ryan shifted his position to deflect attention from charges of corruption against his Secretary of State, but Ryan's description of his internal turmoil is compelling. "I knew I couldn't make myself live through what I'd experienced with Kokoraleis," he says. "I just couldn't do it again."

In the fall of 1999 the *Chicago Tribune* published an examination of every Illinois death-row case since 1977, revealing, among other things, that more than one-third of all 285 Illinois capital convictions over that period had been reversed because of "fundamental error." It was the final straw. Last January Ryan acted, unilaterally issuing his moratorium. He also assembled a commission, including such notable death-penalty opponents as Scott Turow and former Senator Paul Simon, to report on the roots of Illinois's false-conviction record. Ryan's moratorium—combined with relentless reporting by the *Tribune*—has had a seismic impact on Illinois politics. The commission's hearings have insured that death-row injustice is never far from the front page.

Ryan's position has changed over the past year. In May he told Northwestern students he doubted there would be another execution on his watch. Now, he is convinced that "moral certainty" in capital cases isn't possible. And he's broadened his focus: "My concern is not just with the death penalty as a singular issue; it's with the entire criminal justice system. If innocent people are sentenced to death—cases that get all kinds of scrutiny—what does that say about invisible, low-level cases, drug cases and so on?" Ryan has ordered the first wholesale reassessment of Illinois's criminal code in forty years; when he talks about sentencing disparities for drug offenses he sounds more like Jesse Jackson than Dennis Hastert.

Ryan argues, with great passion, that criminal-justice reformers need to extend their traditional concern for the poor to middle-class and suburban defendants—building a bridge to new constituencies. "I have seen people charged in drug cases where down comes the full force of the federal Treasury," he says. "Someone who is poor will get a free lawyer. But a truck driver, for instance, will have to mortgage his house and sell his rig to pay a lawyer. Then, when he is found not guilty, where can he go to get that house back, to get on with his life?"

These days Ryan often gets asked how he feels about fellow Republican George W. Bush's love affair with executions. He says he's had a "short conversation" with Bush about it and quickly adds that he has far more authority than Bush to halt individual executions.

Ryan's transformation is a journey still in progress. Most Americans will never have the occasion to feel revulsion for their own role in an execution. But that "jolt" he felt, and the moral anguish that followed, mirror a growing public unease. "A lot of people are like me, I think. The death penalty was a fact of life," he says. "But as people become more and more aware of the unfairness, they become less enthusiastic." Ryan, the heartland conservative, has tested his lifelong support for the death penalty against the evidence, and the institution has come up short: "I question the entire system and the people connected with it."

BRUCE SHAPIRO

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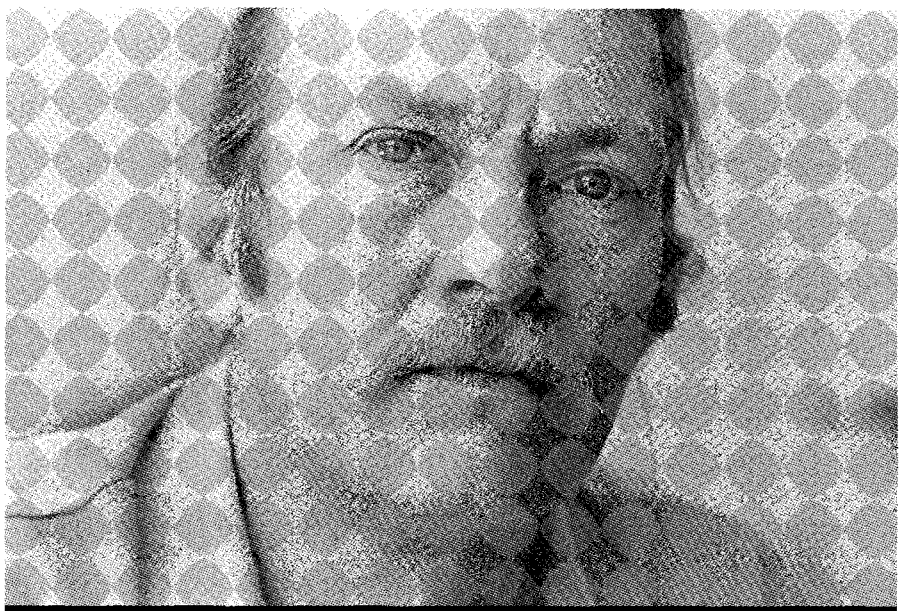
next to the death penalty). In Indiana, a capital case costs about $4 million—and that's just to get to the appellate stage. David Cook, a former death-penalty prosecutor, complained to the Indianapolis *Star/News*, "If you're gonna spend this type of money in a system where there isn't much resources to go around, I think that we have a reasonable right to expect that we're gaining something by doing this.... We don't gain anything by doing this."

Counties bear much, and sometimes all, the cost of these trials, and smaller counties would almost rather ignore a murderer than go broke trying to kill him. The district attorney in the Ogeechee Circuit in east Georgia said, sure, there were criminals in his district who deserved to die, but trying a death-penalty case "in a county of 8,000 people might bankrupt the county. How do you do it?" In Mississippi, small counties quarrel fiercely over which side of the county line the body was found on—neither wanting to take on the cost of the trial. In Washington State two counties were sucked so dry by murder trials that they had to lay off personnel and suspend plans for replacing broken equipment. It cost Suffolk County and New York State $2.3 million in 1999 to convict Robert Shulman of murder, which *Newsday* noted is twice what it would have cost the state to keep him in prison until he is 85. The *Daily News* got into the act by predicting that by the time Shulman is ultimately executed, his appeals and the trials and appeals of others processed in the meantime will have cost the state about $408 million.



LOREN SANTOW/IMPACT VISUALS

Joseph Burrows: sentenced to death August 1989, freed September 1994

Maybe that's an exaggeration, but whatever the cost, Professor James Acker, a death-penalty expert, stated the obvious: "The return on the dollar of these investments is really quite poor." And nowhere poorer than in Florida, where the *Palm Beach Post* estimated that the death penalty has cost the state $51 million a year above and beyond what it would have cost to punish all first-degree murderers with life in prison without parole. That averages out to $24 million for each of the forty-four executions in Florida since 1979.

The Long, Long Wait for Revenge

Again, the question: What's the profit from pumping so much money into this strange punishment? Deterrence? Since the 1970s, the South has carried out 80 percent of the executions, and its murderers are still the busiest in the nation. On May 25, 1979, guards at the Florida penitentiary dragged John Spenkelink, gagged and struggling, into the execution chamber, strapped him into the chair and threw the switch. Surely that made would-be murderers think twice, didn't it? No. In the three years before his execution, Florida averaged 904 murders annually; in the three years after, the number averaged 1,440—a 59 percent increase.

Better than statistics in this debate are the instincts of those who have spent their lives trying to control violence. The nation's police chiefs certainly don't seem to have much confidence in the death penalty as a deterrent. Responding to a 1995 Hart Research Poll, only 1 percent said expanding the death penalty would help reduce violent crime.

Revenge? Is that what you want for your money? Well, there are plenty of men and women on the nation's death rows who rightly provoke that desire: mass murderers, murderers who killed for fun, murderers who killed for hire, who raped and tortured women, who raped and tortured children. There is, of course, a wide range of savagery represented on death row. Some is relatively simple, like the Georgian who killed his lover by jamming a screwdriver into his ear and twisting it, then tried to get rid of the body by cutting it up and flushing it down the garbage disposal.

But you would be better off if you forgot about a-life-for-a-life revenge and began supporting the much cheaper and just as final LWOP, for the death penalty is the least efficient form of revenge. Since the United States cranked up "modern" capital punishment with new rules in 1976, there hasn't been a year in which the nation has managed to execute even 3 percent of its death-row inmates, and the average year saw the demise of fewer than 2 percent. Of the approximately 6,700 people sentenced to die between 1973 and 1999, only 598—fewer than one in eleven—were executed. And about four times as many were given new trials and lesser sentences or gained clemency. California saw its death row, the largest in the nation, grow from 350 to about 550 inmates between 1992 and 2000, while it executed only seven men; in the same period, state and federal courts overturned twenty-three of its death sentences.

Obviously, any spectator waiting around for revenge in a particular case may wait so long he will forget what he's waiting for; the average stay on death row before execution is about eleven years, and a residency of twenty years isn't unusual. When Texas executed Gary Graham amid much controversy recently, it got rid of a boarder who had been on death row eighteen years. Karla Faye Tucker, the first woman executed in Texas since the Civil War, had been there thirteen years. More to the point—and more to the embarrassment of the prosecutors and judges who sent them there—since the death penalty was reinstated, revenge-seekers

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have watched eighty-nine condemned men walk out the prison gates free, either because evidence was uncovered proving their innocence or because some appellate court decided they had received a trial that had no relationship to justice.

The Corruption of Justice

Such reversals are rather common, because some judges and prosecuting attorneys just aren't very smart and others (sometimes with the help of crooked law enforcement officers) are a crafty bunch who abuse and exploit the law for political purposes. Those groups together have helped turn the death penalty into a con game that is corruptly and stupidly administered. Two dramatic studies supporting that conclusion recently made headlines everywhere. This past June, researchers at Columbia University's Justice Project completed a statistical study of death-penalty appeals that passed through the nation's courts between 1973 and 1995. They found that 2,370 death sentences—seven out of ten handed down during those years—had been thrown out on appeal because of serious flaws in the trials: Perhaps the judge had given prejudicial instructions to the jury, or the prosecutor had suppressed evidence, or the cops had falsified evidence, or the defense attorney had been totally incompetent, or there had been some other equally unacceptable conduct. It was enough to make the authors of this monumental study conclude that the death penalty system is "wasteful and broken...collapsing under the weight of its own mistakes."

Right now the Columbia University group is trying to finish the job, plowing through the thousands of cases reviewed by hundreds of state and federal appellate judges since 1995. Its preliminary finding is that "the error-proneness and irrationality" shown in the original study "has not somehow evaporated in the succeeding four years...and may be getting worse."

The second major study was done by a crack team of reporters at the *Chicago Tribune* who probed the muddy underpinnings of justice in Illinois. They made the first comprehensive examination of all 285 death-penalty cases handled in that state since the penalty was restored twenty-two years ago. This was their general conclusion: "Capital punishment in Illinois is a system so riddled with faulty evidence, unscrupulous trial tactics and legal incompetence that justice has been forsaken." In thirty-three cases the defendant was sentenced to die at a trial where he had an attorney who was disbarred or suspended at some time in his career for incompetent or criminal actions. In forty-six cases the prosecutor's evidence relied heavily on a jailhouse snitch; in twenty cases the prosecutor's case depended on a crime lab's comparison of hairs—and both kinds of evidence are considered so unreliable that up-to-date courts treat them as bad jokes. And in thirty-five cases, a defendant sent to death row was black and the jury that condemned him was all white.

(The US Constitution forbids racial discrimination in jury selection, but prosecutors have ways of getting around the prohibition, and judges often ignore the violation. Because blacks—for historically good reasons—are known to be far less likely to support the death penalty, prosecutors go out of their way to keep them off capital juries. In Philadelphia, there was a secret school that taught prosecutors how to block blacks from juries.)

The *Tribune* noted that "forty percent of Illinois's death-penalty cases are characterized by at least one of the above elements. Sometimes, all of the elements appear in a single case. Dennis Williams, who is black, was sentenced to die by an all-white Cook County jury; prosecuted with evidence that included a jailhouse informant and hair comparison; and defended, none too well, by an attorney who was later disbarred."

Which brings up another major cost of capital cases. In several states, taxpayers have had to fork over multimillion-dollar settlements to wrongly convicted death-row inmates. Williams, mentioned above, got nearly $13 million for his eighteen years of wrongful imprisonment. Because there were so many errors by judges and so much misconduct by prosecutors and ineptitude by defense attorneys, the Illinois Supreme Court has vacated 49 percent of the death sentences and ordered new trials or new sentencing.

Hanging Judges

The good news is that the defective sentences would not have been thrown out if there hadn't been federal and state judges of some integrity—yes, they do exist—to catch the errors and force them to be corrected. Florida's Supreme Court, for example, found trial errors requiring retrial or resentencing in an astounding 83 percent of the first-time death-penalty appeals it reviewed in 1999.

But in several states and regions, such judges seem to be extremely rare. For a prime example, consider Virginia's state appellate courts and the federal Court of Appeals for the Fourth Circuit, which handles appeals from Virginia. They seem to have gone into business together as a kind of abattoir. Unlike other states and other federal circuits, they think virtually all capital trials have been fair and error-free and that there's no reason not to speed up the executions. Virginia has the lowest percentage of capital reversals in the country (nearly half that of the next lowest state, and less than one-fourth the national average).

Does this mean Virginia's trials are outstandingly fair and error-free? Or does it mean that the appellate judges are willingly blind to the errors because they like to keep the death-row production line humming? They certainly succeed at the latter: Virginia has an extremely high rate of execution, nearly double that of the next highest state and five times the national average.

The Fourth Circuit, a veritable rubber stamp for capital sentences, is recognized as being by far the most conservative court in the federal appellate system. It is a hotbed of right-wing Republicanism, the same kind that guides the Texas Court of Criminal Appeals, and it is largely because of the TCCA that Texas has executed two and a half times more people than even that hard-charging runner-up, Virginia.

Ten years ago the Texas panel had a few humane members, and they weren't timid about criticizing their colleagues' judgments. When the court refused to hear a capital case because an inept lawyer failed to file an appeal before the prescribed deadline, Judge Morris Overstreet denounced the decision as bordering on "barbarism because such action punishes the applicant for his lawyer's mistakes." Judge Overstreet is no longer on the court. Neither is Judge Charles Baird, who had the gall to suggest that his conservative colleagues shouldn't be so

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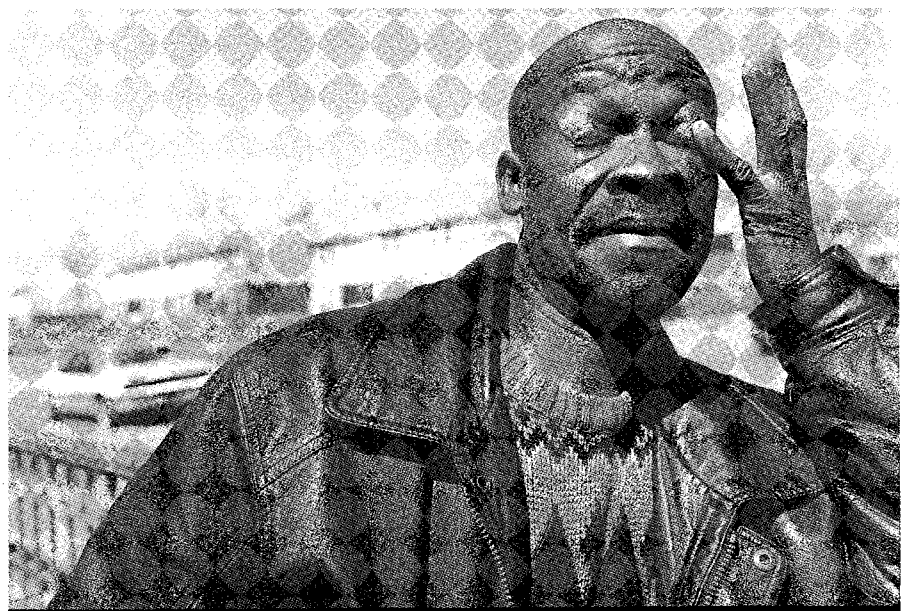
speedy in approving death for defendants who had been given worthless attorneys.

Tired of listening to malcontents like Baird and Overstreet, leaders of the state Republican Party launched a successful campaign to take over the court—in fact, all the courts in the state. It was a partisan rout. As the dean of one Texas law school put it, "If Bozo the Clown had been running as a Republican against any Democrat, he would have had a chance." Indeed, several bozos were elected. One of the newly elected members at the TCCA was Stephen Mansfield. In his campaign he lied about his birthplace, lied about his prior political experience, lied about his lawyering experience and failed to disclose that he had been fined for practicing law without a license in Florida. All this came out before the election, but 54 percent of the Texas voters backed him because he promised to be really, really tough on those liberal defense attorneys. (There's an aura of tackiness about this court, and Judge Mansfield showed he fit right in when he was arrested for scalping complimentary University of Texas football tickets that members of his court received.)

Chief Judge at the TCCA is Sharon Keller, best known for an appearance on *Frontline* in which she opposed freeing a man who had served ten years for rape even though a DNA test proved him innocent. Jeffrey Toobin had her in mind when he wrote in *The New Yorker* that "in Texas, at least, women judges have enforced the criminal law in general and the death penalty in particular with a greater ferocity than their male predecessors." The all-Republican court has become merciless in what the Texas Defender Service, which aids penniless murder defendants, accurately calls a "superficial, slipshod, politically motivated" review of death-penalty appeals. Between 1973 and 1995, a relatively humane era (by Texas standards), the TCCA reversed 35 percent of death sentences, putting it in the mainstream of appellate courts nationwide. But since 1995, with right-wingers totally in control, it has reversed only eight of 256 capital cases—at 3 percent, the lowest reversal rate in the country.



LOREN SANTOW/IMPACT VISUALS

Verneal Jimerson: sentenced to death December 1985, freed June 1996

The TCCA is so eager to keep the juggernaut rolling that even when it makes mistakes so glaring it is forced to admit them, the court refuses to correct the mistakes. Some mistakes are so egregious that it's hard to believe they are accidental. On several occasions the court's opinion upholding a death sentence is at least partly based on trial record "excerpts" that simply were never in the record. The TCCA seems to have made them up for the occasion.

For Free, You Get a Drunk Lawyer

Virtually everyone accused of murder is penniless or close to it. Thanks to the Sixth Amendment to the Constitution, they must be given an attorney. But the constitutional guarantee says nothing about the quality of representation, which, except for the all-too-rare pro bono help from an established law firm, is generally dismal. The reason for the rarity of pro bono help is that even the most charitable firms don't relish spending many thousands of hours and dollars to handle the appeal of some scruffy nobody. A lawyer from Vinson & Elkins, one of Houston's most powerful law firms, spent five years and $2.5 million in billable time proving that Ricardo Aldape Guerra had been framed as a result of police intimidation of witnesses and did not belong on death row, where he had spent fourteen years. Lawyers from the mighty New York firm of Paul, Weiss, Rifkind, Wharton & Garrison have spent more than $1 million in pro bono hours trying to save mentally retarded Johnny Paul Penry, who has been on Texas's death row for twenty years. Help like that is the stuff of death-row dreams. Reality is that the legal help most prisoners get is taxpayer-financed on the cheap; compensation in some states hovers around $20 an hour. Considering the complexity of death law, the appointment of lawyers willing to work for those wages is (as someone has said) "like asking a chiropractor to do brain surgery."

There is considerable variety among the states in the quality of help penniless murder defendants are given, but since outgoing Texas Attorney General John Cornyn has said his state offers "super due process," let us focus on Texas justice. Of the state's 254 counties, only three have public defender programs. In the others, county judges pick the defense attorneys. They often reach into the bottom of the barrel and appoint hacks who are personal friends, political supporters and contributors, and, most of all, attorneys with a reputation for "moving" cases fast with little regard for the quality of defense they give. Texas's county judges have appointed lawyers known to be drunks or drug addicts or both. Some of these court-appointed hacks know absolutely nothing about capital jurisprudence. Several have become famous for sleeping through parts of trials. The most notorious sleeper was Joe Frank Cannon, who was popular with some Houston judges because, as he boasted, he could move a trial "like greased lightning." Ten of Cannon's twelve capital clients went to death row.

But even the best-qualified court-appointed defense attorneys face heavy odds. They go up against veteran prosecutors who are

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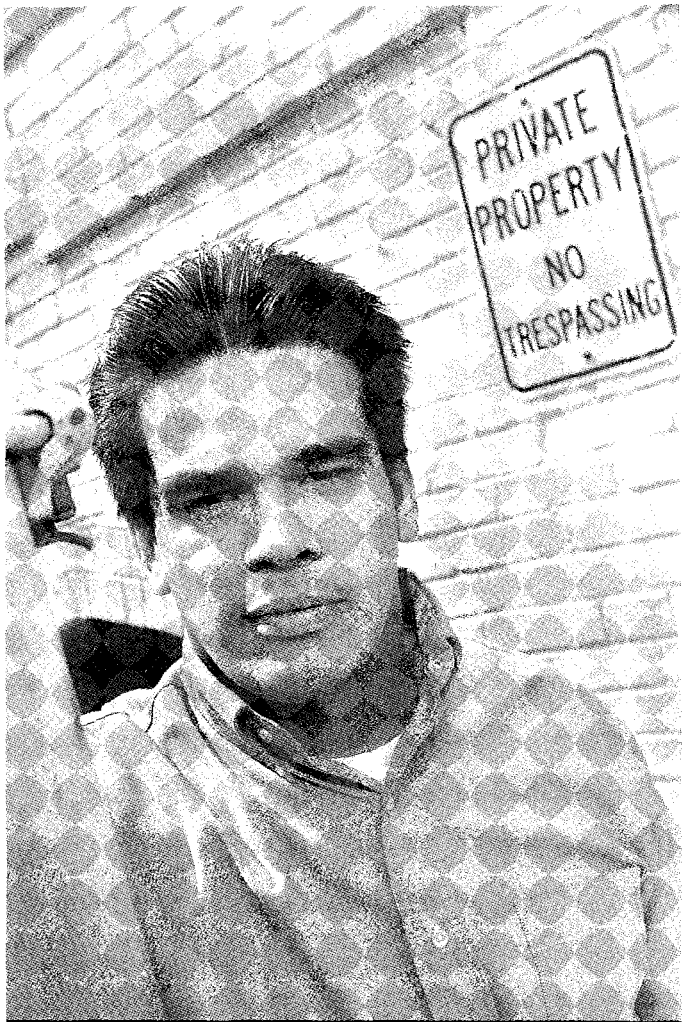
backed by a team of colleagues, aided by police, medical examiners and crime and ballistics labs. A court-appointed defender can't hope to defeat that army without at least the help of a second attorney and an investigator with a budget of several thousand bucks. Many Texas counties, being poor, do not appoint a second attorney, and they usually give the defense no more than $500 to hire an investigator.

For postconviction appeals, Texas indigents get lawyers appointed from a list approved by the Court of Criminal Appeals. Once it chose two of its former law clerks who had no experience in such matters to handle fourteen postconviction cases—



LOREN SANTOW/IMPACT VISUALS

Rolando Cruz: sentenced to death March 1985, freed November 1995

a load that not even two really experienced lawyers could properly handle. The court has selected lawyers who don't know how to prepare postconviction petitions or when to file them—and don't try to find out. One defendant got a lawyer who previously prosecuted him in two cases, was known to have a cocaine problem and failed to file for a postconviction review on time. The Court of Criminal Appeals has never, in any case, removed an appointed counsel because of incompetence. When inmates realize they have been given a dunce or a druggie and ask for a new attorney, the court always turns them down without comment.

Stephen Bright, director of the Southern Center for Human Rights in Atlanta, says, "A person may be condemned to die in Texas in a process that has the integrity of a professional wrestling match."

And when these defendants are convicted, which they usually are, and they base their appeals on the conduct of their attorneys, the Texas Court of Criminal Appeals as often as not will rule against them, saying that the failure of the appointed attorneys to give anything remotely like a defense was "harmless error."

Consider the trial of Jesus Romero in San Antonio. After Romero was found guilty of murder, this was all that attorney Jon Wood offered the jury as a plea for mercy: "You are an extremely intelligent jury. You've got that man's life in your hands. You can take it or not. That's all I have to say." You won't be surprised to learn that Romero was found guilty. You may be surprised to learn that he was executed because the Court of Appeals for the Fifth Circuit said it also thought his attorney had given a perfectly fine defense. Well, that's capital punishment these days.

The Fifth Circuit was equally forgiving in the Texas trial of Ramon Mata. The defense attorney had teamed up with the prosecutor to make sure they had an all-white jury. Again, it was just "harmless error."

After Illinois's governor declared a moratorium on executions because DNA tests had found that some inmates on death row were innocent, George W. Bush was asked if it was possible Texas had executed any innocent people. Nah, he said, Texas always did things right. So the *Chicago Tribune* sent a team of reporters down there to look over the records of the 131 inmates who had been executed in Bush's reign up to that time. They found that nearly one-third of the losers had been given attorneys who had at one time or another been publicly sanctioned for misconduct.

The Rot Is Everywhere

Don't for a minute think that Texas is unique in offering that kind of sloppy justice. Assigning incompetent lawyers to help indigent defendants is as common as kudzu.

§ A few years ago, one-third of the twenty-six men on Kentucky's death row had lawyers who were eventually disbarred or had their licenses suspended.

§ In a Georgia capital case, an indigent black defendant was assigned as his attorney none other than James Venable, 83, a former Imperial Wizard of the Ku Klux Klan who was notorious for sleeping through trials.

§ In another Georgia capital case, this was the court-appointed lawyer's wrap-up argument for mercy: "You have got a little ole niggerman over there that doesn't weigh over 135 pounds. He is poor and he is broke. He's got an appointed lawyer.... He is ignorant. I will venture to say he has an IQ of not over 80." The defendant was sentenced to death. (Stephen Bright observed: "Had that lawyer done any investigation into the life and background of his client, he would have found that his client was not simply 'ignorant.' Instead, he was mentally retarded. For that reason, he had been rejected from military service. And he had been unable to function in school or at any job except the most repetitive and menial ones. His actual IQ was far from 80; it was 68. He could not do such basic things as make change or drive an automobile.... That could have influenced the jury for mercy.")

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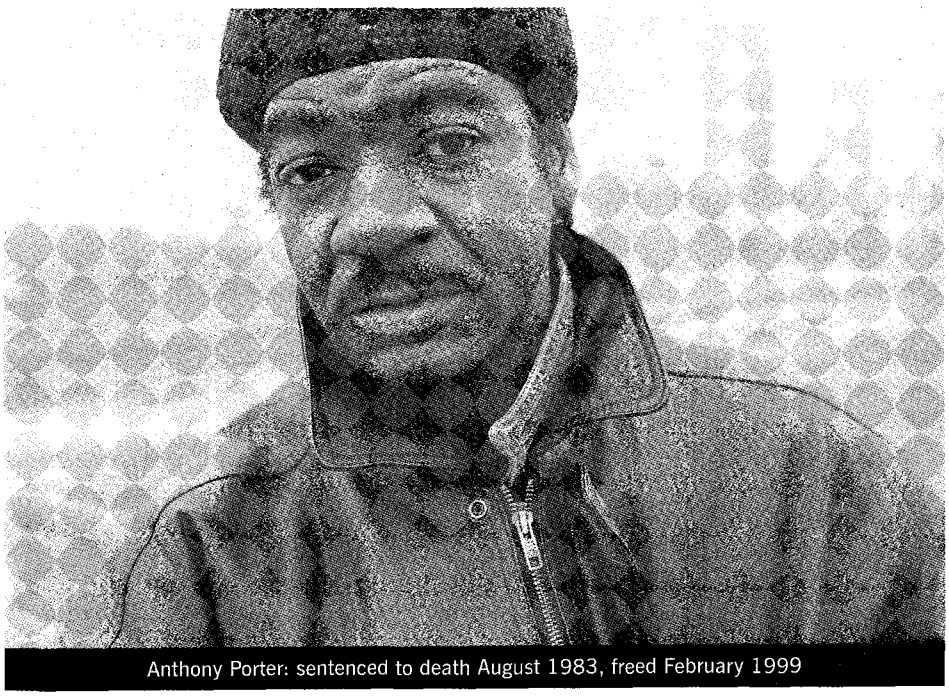
The Short Life of Reform

Not all indigent defendants have incompetent lawyers. There are some dedicated defense lawyers who accept long hours, bad pay and very long odds as part of their calling. There just aren't enough of them. But for a time, not long ago, they got federal support from the Post-Conviction Defender Organizations (originally known as the Death Penalty Resource Centers). These came into being in 1988 because the federal appellate courts were drowning in emergency habeas corpus filings from death-row prisoners seeking stays of execution. Scads of the petitions were poorly drawn, because there weren't enough seasoned lawyers out there to help the petitioners. Inmates were being executed because they had nobody to help them file appeals on time. The states had no workable program for matching good lawyers with indigent prisoners. Civil rights groups like the NAACP and other nonprofit legal services tried to help but were falling far behind. Congress did nothing about it until these groups and the American Bar Association raised so much hell that Congress was forced to fund the Death Penalty Resource Centers.

There was already a nucleus of those eighteen-hour-day defense zealots, but they needed money to survive and expand. Now they had it. They recruited lawyers from major law firms, and if the recruits needed the special training that capital lawyering calls for, they got it. Sometimes Resource Center lawyers were directly involved in both the trials and the appeals. Their successes became the stuff of legend.

With their help, George Daniel, who had been on the execution list for six years, won a new trial and got off Alabama's death row. Attorneys from one of Atlanta's best law firms were recruited for Gary Nelson, and they freed him from death row after eleven years by proving that the prosecution's case was corrupt, top to bottom. One of their most dramatic victories was in saving Frederico Martinez-Macias. A nine-year veteran of death row, he was just two days from his scheduled execution when the Texas Resource Center recruited a Washington, DC, law firm and helped it prepare his appeal, which ended with Martinez-Macias walking free.

The Resource Centers were so successful that, of course, conservatives in Congress couldn't stand it. Neither could prosecutors, who hated getting whipped by these intruders. Republican Congressmen from South Carolina and Texas launched a crusade to withdraw funds and kill the centers. In 1995 they succeeded.



LOREN SANTOW/IMPACT VISUALS

Anthony Porter: sentenced to death August 1983, freed February 1999

II.
The Supreme Court's Dismaying Muddle

From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored... along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor. Rather than continue to coddle the Court's delusion that the desired level of fairness has been achieved...I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed.

—*Justice Harry Blackmun, dissenting,* Callins v. Collins, *1994*

The primary source of this humongous, ongoing travesty of justice is the US Supreme Court. In the early 1970s, it had its best chance to rid the nation of the death-penalty headache, but it failed then, and it has been making things worse ever since. Many legal scholars would agree with Carol and Jordan Steiker, who wrote in the *Harvard Law Review* in 1995: "How and why did the Court create a body of law at once so messy and so meaningless?... The Supreme Court's chosen path of constitutional regulation of the death penalty has been a disaster, an enormous regulatory effort with almost no rationalizing effect."

The heyday of capital punishment in the United States was in the 1930s, when executions averaged 167 a year. In the 1940s, the average dropped to 129. The dramatic decline that began in the 1950s (with an average of seventy-two) was largely due to the civil rights movement, which raised hell about the disproportionate use of minority bodies for execution (55 percent of all executions; 90 percent of those for rape). Since most of the nation's executions were in the South, one didn't need a keen legal mind to see that racial bias had something to do with it. Because of the NAACP Legal Defense and Educational Fund's heroic onslaught of lawsuits challenging the constitutionality of the death penalty, the number of executions plummeted to forty-two in 1961 and down, down, finally, to two in 1967. Then a moratorium on executions took place while the states and the lower courts waited for the Supreme Court to decide what should be done next.

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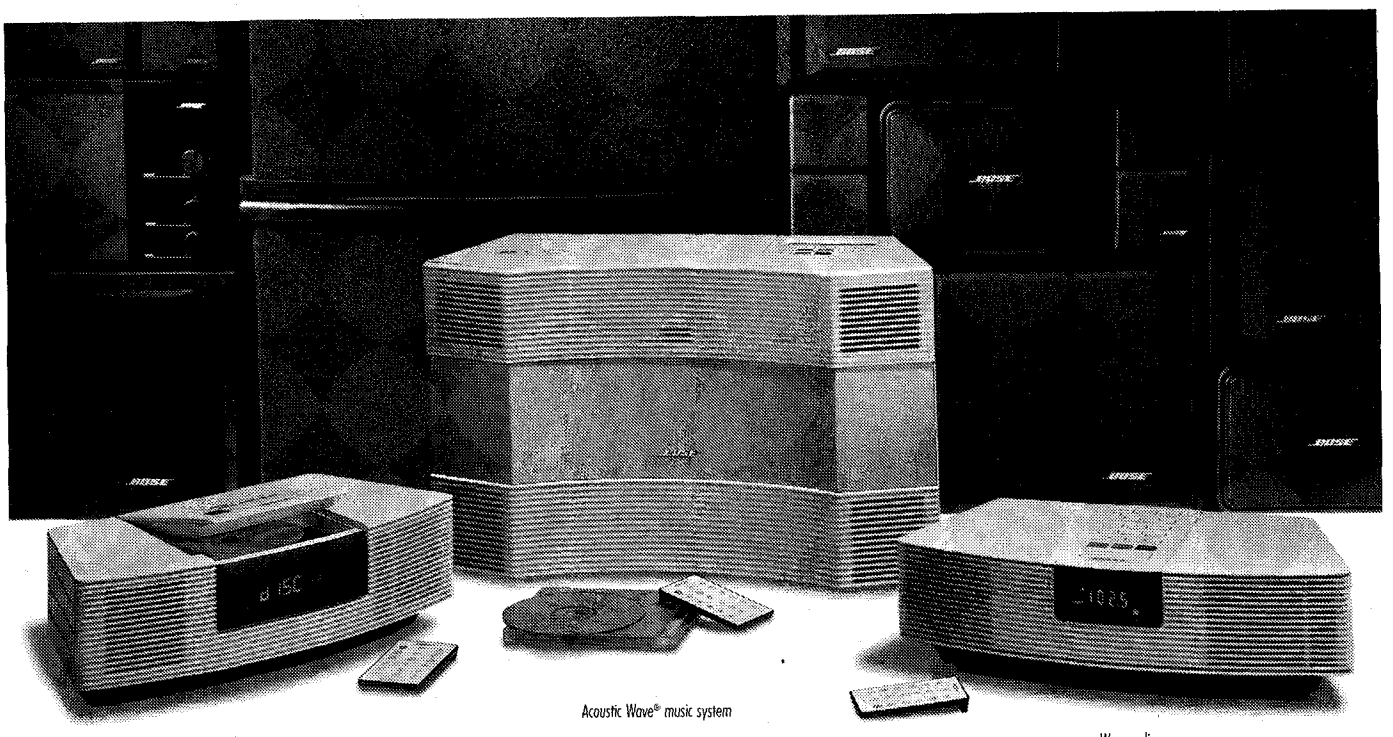

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Traditionalists' Last Stand

The quiet that followed was broken in 1971 when the Supreme Court heard *McGautha v. California*. The decision in that case was very strange indeed, considering the 180-degree turnaround the Court would make the very next year, in *Furman v. Georgia*. The conflict between those two decisions, coming so close together, foretold the chaos to come.

In *McGautha*, lawyers for two men convicted of murder, one from California, the other from Ohio, argued that their trials were constitutionally intolerable because the juries were left with nothing but their conscience, intelligence and sense of fair play to guide them. They said the juries should have been given standards for measuring the wickedness of the crimes, and for delving into the character, the background and the intent of the defendants to determine if reasons for mercy could be found. Additionally, lawyers for the Ohio defendant complained that their man hadn't got a fair shake because his jury had decided on guilt and punishment at the same time, instead of separating the decisions into two processes, as had been done for the California defendant.

The Supreme Court's 5-to-4 opinion, written by Justice John Harlan, an Eisenhower appointee, came down to this: The traditional system of leaving life-and-death decisions to a jury's unguided discretion was working OK and did not offend the Constitution. Common sense and fair play were enough. People who wanted to write specific "guiding standards" for weighing degrees of guilt and innocence were asking the impossible, because putting such guidance "in language which can be fairly understood and applied" would be a task "beyond present human ability."

Judges, prosecutors and juries were administering the penalty so randomly, so capriciously, that it was like 'being struck by lightning.'

Harlan's skepticism was prophetic.

As for the Ohio defendant's other complaint—that he didn't get a fair shake because the guilt phase and the penalty phase of the trial were not separated—that gave Harlan a chance to thumb his nose at those eggheads at the American Law Institute and the National Commission on Reform of Federal Criminal Law who had recommended the separation. Tough luck, said Harlan, for the Constitution "does not guarantee trial procedures that are the best of all worlds, or that accord with the most enlightened ideas of students of the infant science of criminology."

It was the old boy's last big chance to strike a blow for tradition. Shortly thereafter, Harlan retired and died. If he had lived even another year he would have been shocked to see the dazzling speed with which the Supreme Court can change its mind. It happened with *Furman v. Georgia*. The nine separate opinions totaled 50,000 words, the most voluminous dialogue in Court history. Stanford University law professor Robert Weisberg likened it to "a badly orchestrated opera, with nine characters taking turns to offer their own arias."

The case dealt with appeals from three black men who had been sentenced to death, one for murder, the other two for raping white women. William Furman was the murderer. At trial he gave this description of how he accidentally shot his white victim through a door: "They got me charged with murder and I admit, I admit going to these folks' home and they did caught me in there and I was coming back out, backing up and there was a wire down there on the floor. I was coming out backwards and fell back and I didn't intend to kill nobody. I didn't know they was behind the door. The gun went off and I didn't know nothing about no murder until they arrested me, and when the gun went off I was down on the floor and I got up and ran. That's all to it." As a matter of fact, the Georgia Supreme Court accepted Furman's explanation, but it nevertheless upheld the death sentence. (Let us pause to point out the obvious: This was, as Furman's attorney said, "a regular garden-variety burglary murder." A white defendant would have got maybe twenty years.)

In *Furman*, as in *McGautha*, the Supreme Court was asked if the death sentence was "cruel and unusual." This time, it said yes—but it was a weak yes. Only two of the 5-to-4 majority, William Brennan and Thurgood Marshall, thought capital punishment itself cruel and unusual, but all five of the majority said the way the penalty was applied was unconstitutional.

What galled them was that judges, prosecutors and juries were administering the penalty so randomly, so capriciously, that it was like "being struck by lightning," said Justice Potter Stewart. Justice Byron White—who wanted more, not fewer executions—complained that after being exposed to "hundreds and hundreds of federal and state criminal cases" that could have resulted in the death penalty and seeing only a handful of defendants selected for execution, he considered the system totally irrational and just based on luck. Justice Brennan also emphasized the element of luck: "When a country of over 200 million people inflicts an unusually severe punishment no more than 50 times a year," even though thousands of murders are committed annually, "it smacks of little more than a lottery system."

The Supreme Court's decision was good news for the 600 or so residents of the nation's death rows, including such notables as Robert Kennedy's assassin, Sirhan Sirhan, whose sentences were invalidated. Some were freed; most were resentenced to life terms, with a chance for parole. (The man who gave his name to the case, William Furman, was paroled in 1984, worked on construction jobs and stayed out of trouble. His voting rights were restored in 1988.)

The records of the 600 show just how capriciously the death program had been operating. Two-thirds of the condemned were on Southern death rows, the most by far in Florida and Texas, with Georgia and Louisiana close behind. All of the eighty-one who had been condemned for rape were in the South, nearly one-third of them in Florida, with Georgia and Louisiana tied for second place. Fifty-five percent of the capital offenders were black, 43 percent white, 1 percent Hispanic. Records also showed that juries had rarely allowed the men's backgrounds to have any mitigating effect on their sentences. True, most had previously committed crimes, but these were usually property crimes. Nearly three-fourths had never been convicted for a violent crime. Only 39 percent had ever before been in an adult prison.

In *Furman*, the Court was given the best chance it had ever had, and probably the best chance it would ever have in the next hundred years (considering how seldom liberal judges are appointed), to escape from the death-penalty dilemma. Why, oh why,

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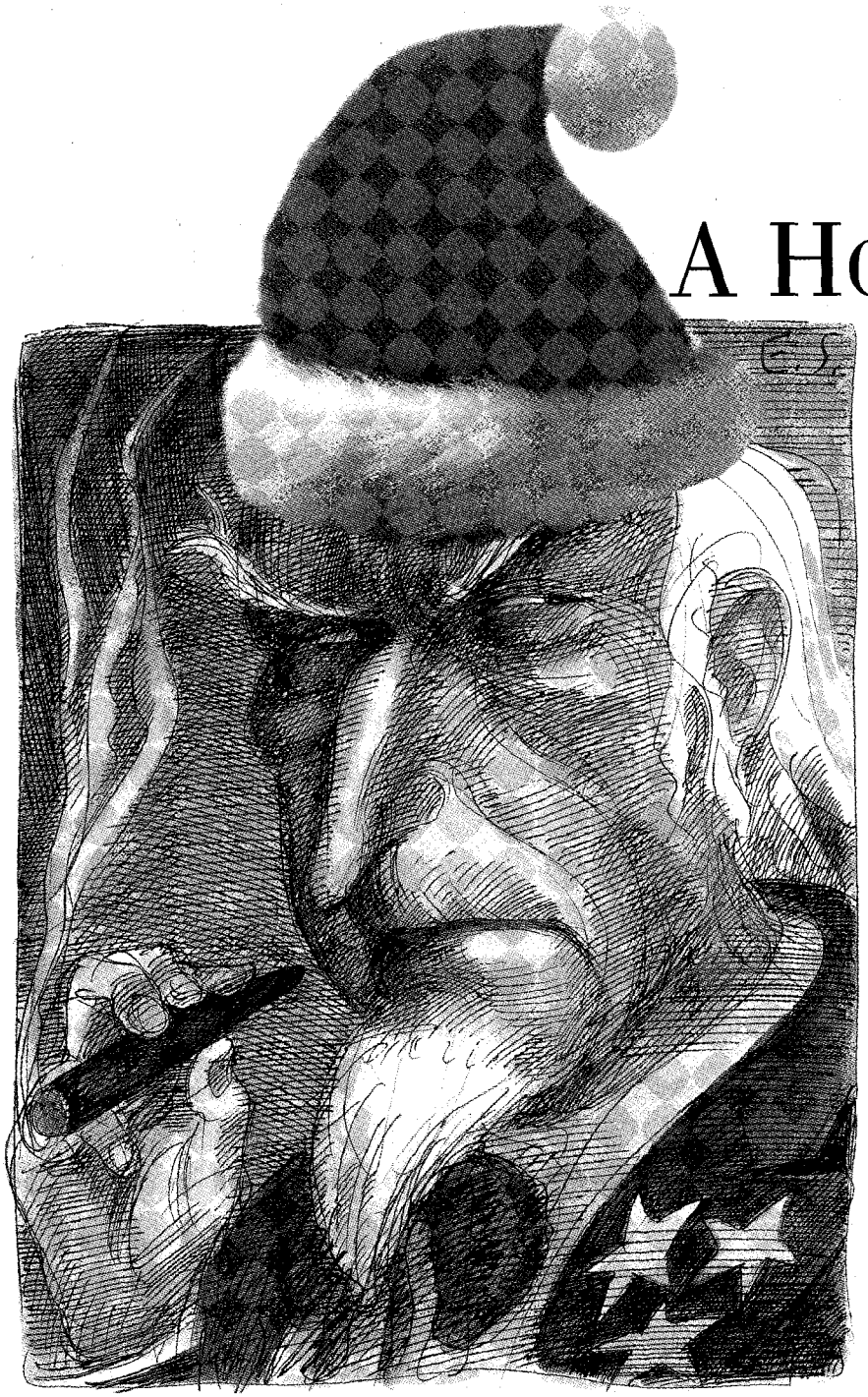

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did they stop short? Why did they say merely that the death penalty was unconstitutional because it hadn't been applied fairly? Why not say it was unconstitutional because it could *never* be applied fairly, and was therefore cruel and unusual?

Instead, the Court sent the state legislators back to the drawing board to try again.

The Blind Leading the Blind

For the states whose lawmakers believed in capital punishment, which was most of them, *Furman* was an excruciating turn of events. They were left, as Robert Weisberg put it, with "an emotional and confusing ensemble of exhortations...to solve a problem that the Court could barely identify." They were expected to come up with a system that would give at least the symbolic appearance of objectivity and predictability. Fumbling along, three dozen states eventually wrote "reformed" death-penalty statutes. Ironically, most of the new laws did exactly what the defense attorneys in the *McGautha* case had asked for and which the Court's majority at that time had scorned.

In most states, the new laws called for splitting the capital punishment ritual into two parts. First the jury would decide whether the defendant was guilty. If it judged him guilty, then the jury would reconvene to decide whether he should pay for his crime by being executed or by serving some portion of his life in prison. Most, but not all, of the new statutes required that the death-penalty phase be guided by a checklist of aggravating and mitigating circumstances surrounding the murder: What was the killer's motivation? What was his criminal record? How brutal, how indefensible was the crime? Who were his victims? Did he deserve sympathy because of his age, because of a wretched home life, because he was an addict, because of his mental state at the time of the murder, etc.? The checklist was clearly intended to keep the jury's mind narrowly focused, to keep it from wandering all over the psychic landscape as it allegedly had in the pre-*Furman* days. On paper these checklists had the refined air of scientific formulas. In fact, they were anything but scientific, and they would, as the result of other Supreme Court rulings, become about as well-ordered as the contents of a typical wastebasket.

Florida, which had more people on death row than any other state when the old law was thrown out, apparently felt naked without one, and it was the first to write a new law, completing it within six months. But other Deep South states were close behind. Some were so eager to start executing murderers again that they began filling up their death rows even before the new statutes had been approved by the Supreme Court. But they didn't have to wait long.

Populism Gone Berserk

In *Furman*, the majority had said the manner of deciding who would be sentenced to death row was unconstitutional, but they left hanging the question of whether the punishment itself was "cruel and unusual" and hence unconstitutional. In 1976 that was answered when the Court approved the new death penalty statutes in Georgia, Texas and Florida.

The lead opinion in *Gregg v. Georgia* was written by Justice Stewart. In *Furman*, he had complained that death was being dealt out with all the randomness of "being struck by lightning." Now, speaking for the Court's majority, he came up with an absolutely bizarre rationalization for concluding that the new statutes would result in judgments as dependable as a light switch. Why would this be? Because they were the voice of the local people—"the community's belief," as expressed by the legislatures. What! He thought the US Supreme Court should bow to the biases of local and state pols in constitutional matters of life and death?

If the Georgia legislature (or the Texas legislature, or any other legislature) said capital punishment was needed, then who was the Court to say it was wrong? The Court, Stewart wrote, had a high regard for "federalism" (i.e., states' rights) and "the ability of a legislature to evaluate, in terms of its particular State, the moral consensus concerning the death penalty and its social utility." These questions should be left to the legislatures to evaluate "in terms of their own local conditions and with a flexibility of approach that is not available to the courts."

This was indeed a strange, stunning surrender, coming as it did from a Supreme Court that over the preceding twenty-two years (beginning with the *Brown v. Board of Education* ruling in 1954), had been knocking the unholy crap out of "community belief" in segregation in half a dozen major civil rights cases. Like those civil rights cases, of course, most death-penalty cases had emerged from the South.

Florida's Folly, and Spenkelink

Not surprisingly, the execution that haunted the new era was in the South's most enthusiastic sentencer of the damned, Florida. As previously mentioned, the victim was John Spenkelink. On May 25, 1979, he became the first person in twelve years to be executed in the United States against his will. (Gary Gilmore had invited Nevada to kill him, and it complied in 1977.)

The background and foreground of Spenkelink's case dramatically demonstrated the way race and social status would continue to dominate the death penalty despite the "reforms" of *Furman*. It also illustrated the confusion that would forever arise from the new guiding standards.

The death penalty is supposed to be reserved for the "worst of the worst" crimes. In an effort to guarantee this, Florida listed this catchall category—"the capital felony was especially heinous, atrocious and cruel"—among the aggravating circumstances that a jury should consider when deciding on the penalty. The Florida Supreme Court said it felt "the meaning of such terms is a matter of common knowledge" and "an ordinary man would not have to guess at what is intended." However, apparently fearing that trial judges and lawyers might stumble where ordinary men would not, the court supplied another bushel of modifiers, explaining, for example, that "heinous" means "extremely wicked and shockingly evil" and that "atrocious" means "outrageously wicked and vile."

Well, OK. But watching the Florida high court itself interpret these words was another matter, and quite enough to leave the ordinary man scratching his head. For instance, Thomas Halliwell, a former Green Beret, became so enraged at his lover's husband that he shattered the man's skull with a steel bar and then used a machete, hacksaw and fishing knife to cut up the body for storage in a garbage can and footlocker. The trial jury said that was

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indeed a heinous, atrocious and cruel crime, but the Florida Supreme Court said it was not, because the mutilation had occurred "many hours" after the crime.

Well, if beating somebody to death with a nineteen-inch steel bar wasn't especially heinous, how about beating somebody to death with a roofing hatchet? How about mortally wounding somebody with a knife and leaving him to die painfully over a long period? How about tying up three people and shooting them in the head? When convictions raising these questions came before the court, the answer in each case was no, not "especially." And in other cases that were no bloodier or even far less bloody, the court ruled in the opposite direction.

One such case involved Spenkelink, a 24-year-old former convict and drifter. He had picked up a hitchhiker named Joseph Szymankiewicz, another former convict, in the Midwest, and together they drove to Florida. Along the way, Szymankiewicz, who was larger and stronger, forced Spenkelink to have sexual relations with him and bullied him into playing Russian roulette.

Thou Shalt Not Kill

Conservative religious groups, representing an enormous constituency and wielding obvious political clout, may be the power that turns the tide of public opinion decisively against the death penalty. Strong support for capital punishment among Christian conservatives has long led an uneasy coexistence with ideals of life, love and tolerance, but until recently this hypocrisy stood unquestioned in the public arena. In the past couple of years, however, Catholic leaders have firmly established the Church's opposition to the death penalty, while leaders of the fundamentalist Christian community have experienced a dramatic turnaround in their stance on the issue. With the support of these leaders comes the possibility that one day soon the majority of Americans may actively oppose the death penalty.

The 1998 execution of Karla Faye Tucker, who became a born-again Christian while in prison, shattered faith in capital punishment in the right-wing evangelical community. Led by Pat Robertson, Christian conservatives had called for clemency in Tucker's case, citing her religious conversion as a reason for mercy. When their efforts failed and Tucker was executed, Robertson was horrified, denouncing the "animal vengeance" corrupting American society. Soon after Tucker's execution, the leading evangelical publication *Christianity Today* ran an editorial with the revolutionary headline "Evangelical Instincts Against Her Execution Were Right, But Not Because She Was a Christian." Criticizing capital punishment as discriminatory and vengeful, the editors concluded that "the death penalty has outlived its usefulness." To the delight of abolitionist groups, Robertson went even further this past April when he voiced his support for a general moratorium on the death penalty. This move, coming from a man who as recently as 1988 called capital punishment "a necessary corrective to violent crime," highlights just how radically discussion of the issue has evolved among Christian fundamentalists.

Catholics received a similar wake-up call in January of 1999, when the Pope made his opposition to the death penalty a public focus of his visit to the United States. In a speech in St. Louis, he used the strongest language against the death penalty he has ever used in this country, stressing that "the new evangelization calls for followers of Christ who are unconditionally pro-life...in every situation." He also made a dramatic (and successful) appeal to Missouri Governor Mel Carnahan to spare the life of death-row inmate Darrell Mease. The Pope's zeal, and his willingness to use his position to push his political views, underscore the potential influence of religious organizations on policy. While it is too soon to tell what impact recent events will have on the religious right, the Pope's speech spurred Catholics to assume an increasingly activist role. A few months after the Pope's visit, Massachusetts bishops fiercely denounced legislation that would have restored the death penalty in their state. Bernard Cardinal Law testified against the bill before the Massachusetts legislature and warned at a press conference that for a Catholic to support the death penalty would be "wrong, morally evil and a sin." Similar legislation had failed to pass by only one vote in 1997, but this time it failed by a seven-vote margin. Newspaper accounts noted a change in the public mood from two years earlier, citing the "moral authority" of Law's intensive lobbying as a possible reason for the change.

Growing political activism among Catholics and evangelical Christians builds on a strong tradition of religious anti-death-penalty activism. The national coalition Religious Organizing Against the Death Penalty Project provides an impressive array of educational materials for use in religious communities; it also sponsors conferences and demonstrations all over the country. Its conference in November 1999 was the largest gathering of abolitionist groups in the history of the movement. It focused in part on organizing techniques for religious communities. ROADP is supported by numerous grassroots religious abolitionist groups, among them People of Faith Against the Death Penalty in North Carolina. PFADP has organized more than sixty protests over the past two years and has persuaded three cities and one county in North Carolina to pass moratorium resolutions. Its moratorium campaign is linked to the larger Moratorium 2000 petition movement, led by Sr. Helen Prejean and the faith-based Quixote Center. This past fall, California People of Faith Working Against the Death Penalty held its annual "Weekend of Faith in Action," in which religious congregations across California spend two days organizing their local communities to take action against capital punishment.

Religious groups add energy and accessibility to a movement that not long ago seemed too radical to appeal to the American mainstream. If Catholics and fundamentalists follow their leadership in crusading against the death penalty, public sentiment may bring abolitionism back into fashion. Let's hope religious conservatives win this battle in their war for the American soul.

MARION GROSS

Marion Gross is a teacher in Dorchester, Massachusetts.

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When they reached Tallahassee, Florida, Spenkelink discovered that his abuser had also stolen his money. They fought, and Spenkelink shot Szymankiewicz to death.

That was on February 4, 1973. Shortly thereafter, a Tallahassee jury convicted Spenkelink of first-degree murder, finding the crime especially heinous, and recommended the death penalty. The trial judge (who in Florida is empowered to overturn a jury's verdict) agreed, and so did the Florida Supreme Court. This was just an ordinary skid-row killing, one trashy nobody killing another trashy nobody in an ordinary fight, after considerable provocation and with considerable justification. If the rhubarb had taken place in Miami, at the other end of the state, where homicides are as common as cumulus clouds and attract little more attention, Spenkelink would probably have drawn ten years in the penitentiary and four inches on page 12 of the *Miami Herald*.

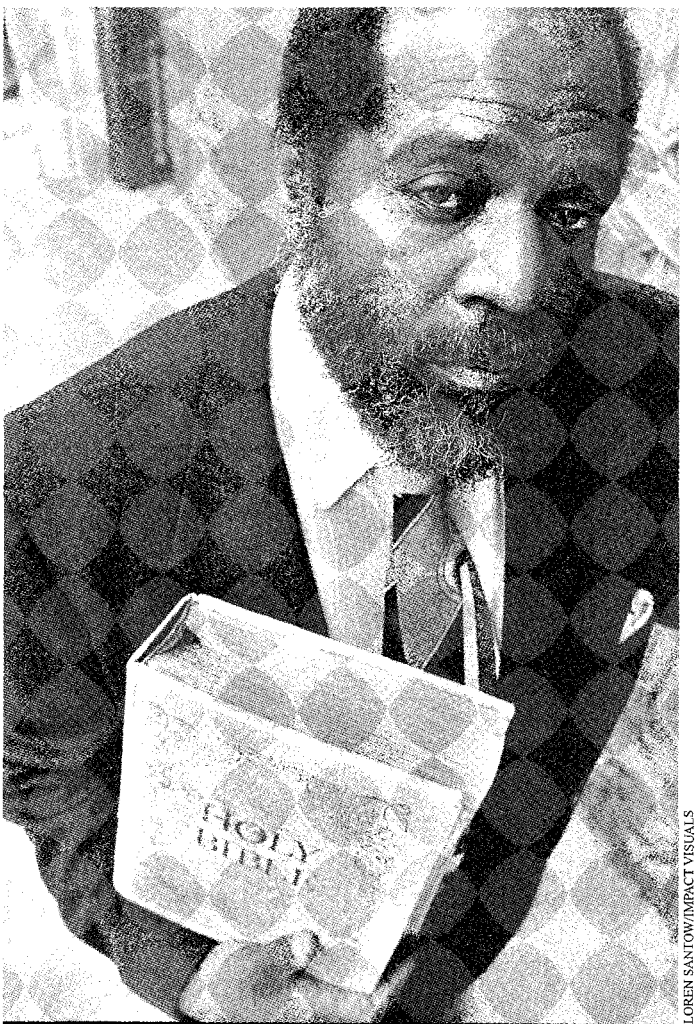
But as Chief Justice Warren Burger acknowledged in his *Furman* dissent, geography does matter: "There are doubtless prisoners on death row who would not be there had they been tried before a different jury or in a different State. In this sense, their fate has been controlled by a fortuitous circumstance." Burger was using fortuitous by its first definition, "happening by chance"—the kind of execution the US Supreme Court was supposedly trying to get away from.

But the Court showed no sympathy for Spenkelink's "fortuitous circumstance" of being tried in Tallahassee, Florida's capital, an ingrown small town near the border of Alabama and Georgia whose recent history had been marred by acts of racial intolerance. It was a place where—as Justice Richard Ervin of the Florida Supreme Court noted in his passionate argument against the execution—names like Spenkelink and Szymankiewicz sound "foreign and strange," and where, because the condemned prisoner had no family roots or business connections, "all the ingredients were present for the exercise of invidious parochial discrimination.... The result here is an old story, often repeated in this jurisdiction where the subconscious prejudices and local mores outweigh humane, civilized understanding when certain segments of the population are up for sentencing for murder."

In short, Justice Ervin was saying in a nice way that Spenkelink had been judged at his trial as the equivalent of a white nigger (a word still current in north Florida in those days).

Indeed, many believed it was his whiteness that probably doomed him to be the first to die. On the same day that Governor Bob Graham signed Spenkelink's warrant, he also signed one for Willie Jasper Darden, who, one might fairly argue, had committed a much more heinous crime than Spenkelink. A career criminal, Darden had shot a furniture owner and while he lay dying tried to force the man's wife into a sex act. When a 16-year-old boy saw the murdered man lying in the doorway and rushed up to help, Darden shot him in the mouth, throat and back.

But Darden was black, and Florida was especially sensitive on this point. Under the old death penalty it had executed twice as many blacks as whites, and twice as many blacks as whites were waiting on its death row to be executed when *Furman* had given everyone a reprieve. So Spenkelink drew the short straw. It was racism, but this time in reverse. (Willie Jasper Darden, by the way, would not be executed until 1988.)



LOREN SANTOW/IMPACT VISUALS

Darby Tillis: sentenced to death October 1979, freed January 1987

The Court Begins to See That It Screwed Up

With Spenkelink's execution, the death-penalty industry started off at the bottom of a pit, and the more it clawed at the sides trying to get out, the more foolish it looked. The Court seemed to realize it had gotten itself mired in something too complex for mortal men and women—even for those who wore black robes and looked solemn—and began showing signs of panic. It had hoped that with the formalized checklist of aggravating and mitigating circumstances, the states could handle this on their own. The last thing the Court wanted to do was micromanage things. But that's what happened.

Sandra Lockett, 21, was the getaway driver for the robbery of an Ohio pawnshop. Murder was not supposed to be in the plan, but one of her accomplices killed the pawnshop owner anyway. She faced the death penalty as an accessory. It was her bad luck that the crime was committed right when the Ohio legislature was writing its death-penalty statute. It had originally said that many things could be considered to mitigate the offense. But after the pawnshop shooting, the legislature cut the mitigating factors to three—none of which applied to Lockett. She was sentenced to die.

Coming to her rescue, the Supreme Court ruled in *Lockett v. Ohio* (1978) that no state statute could limit the mitigating circumstance and that the jury must be allowed to consider anything the defendant thinks might invite mercy. A humane gesture, yes.

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But look what it did to the vaunted "specificity" of the mitigation list that was supposed to be the key to avoiding arbitrariness. Look what it did to the supposed cure-all, "guided discretion." Now, mitigation was wide open. If the same thing happened to the aggravation side of the penalty trial, well, what would be left of the *Furman* reforms? The answer to that came with *Barclay v. Florida* in 1983.

Unguided Discretion Is Back

As a member of the Black Liberation Army, Elwood Barclay had helped murder a white youth in a naïve attempt to start a race war. Although his trial was in Jacksonville, a city with a racist past, the jury kept its cool and voted seven to five to give Barclay a life sentence.

But there was a hitch. In writing their death-penalty statutes to satisfy *Furman*, four states, including Florida, had given judges the power to override the jury. The jury's decision is merely advisory; the judge may rule otherwise. For Barclay, Judge R. Hudson Olliff ruled otherwise. This was the fourth time Olliff had overruled juries that voted for life. No matter by what margin the jury voted for mercy—and in one case it was voted by ten to two—Judge Olliff was unswayed. Unlike the juries, he did not find a single mitigating factor in the lives of these four men. But in Barclay's case, he went dramatically beyond merely overruling the jury. Judge Olliff listed several "statutory" aggravating factors that in fact did not exist—and then threw in a very special one of his own creation: Barclay, the judge said, deserved death because he had preached hatred of white people. That was definitely *not* statutory.

Florida law did not permit any changes in its statutory aggravating circumstances. Surely the appellate courts wouldn't let Olliff get by with messing around like that. When the case reached the Supreme Court, several Justices, even those among the majority (who approved of Barclay's death sentence), sounded amazed that the sentence could have been upheld by the Florida Supreme Court. But never mind. "Mere errors of state law," said Justice William Rehnquist, "are not the concern of this Court."

With the *Barclay* decision, one critic said, the Court was telling state Supreme Courts "that they could uphold death sentences even where the penalty trial seemed clearly to violate federal or state law." With the Court now willing to accept inflated and mangled aggravating statutes—coming on top of the *Lockett* expansion of mitigating statutes—where did that leave the penalty trial? It had become a malleable legal toy, like Silly Putty, for the courts to play with.

Further evidence that "guided discretion" was dead came when the Supreme Court ruled that it was perfectly constitutional for a state to allow a trial judge to reverse a jury's recommendation of life. Whoa! The whole purpose of *Furman* and *Gregg* had been to get away from the "unguided discretion" of juries. Was the unguided discretion of a judge, overruling the guided discretion of a jury, any better?

In any event, the decision hardly raised the quality of mercy in the judicial system. Surveys have found that in the four states where judges have the power to override juries, they almost always use it to change the verdict to death. In Alabama, the ratio is ten to one.

The Last Gasp of Death-Penalty Reform

By the early 1980s, many legal scholars were saying that the Supreme Court had simply given up trying to keep any part of the *Furman* and *Gregg* reforms alive. Law journals were beginning to fill up with essays about what Robert Weisberg called "the deregulation of death." With the aggravation and mitigation rules in limbo, only proportionality remained of the post-1976 reforms, and it was about to die, too.

In its *Gregg v. Georgia* decision—approving models for the new death-penalty statutes—the Court had gone out of its way to urge other states to adopt the "proportionality" part of Georgia's statute. It required the state Supreme Court to ask two common-sense questions: In this particular case, is death an excessive punishment or is it proportional to the offense? When compared with factually similar cases, was the death sentence excessive in this case? One would assume that this kind of weighing and comparing is so basic to justice that the states wouldn't have to be goaded into doing it. In any event, to please the Supreme Court, most states had written proportionality requirements into their capital statutes.

But by the early 1980s the backlog of prisoners awaiting execution had become such a mob (1,209 in 1983) that state appellate courts, most of which had never been keen on proportionality anyway, began complaining that they just couldn't handle it, particularly the part about comparing one case with others that were similar—a process that is extremely time-consuming but that is the very heart of capital justice. So in 1984 (*Pulley v. Harris*) the Supreme Court said, OK, just forget it—proportionality isn't a constitutional requirement. After that, most states put proportionality aside and did forget it. Georgia's "model" proportionality statute has in the past twenty-four years been used only twice to overturn convictions.

Rehnquist-izing Justice

One thing became quite clear as the 1980s rolled along: The Court was getting meaner, as the ranks of its hard-liners got bigger. In 1953, when William Rehnquist was a clerk at the Supreme Court and Julius and Ethel Rosenberg were about to be electrocuted at Sing Sing, he wrote a memo saying, "It is too bad that drawing and quartering has been abolished." When he grew to Justicehood, perhaps he was no longer so bloodthirsty, but he was not shy about saying the death industry's execution line was far too slow. His impatience was shared by Justices Byron White and Lewis Powell. In 1981 Rehnquist gained another ally in Sandra Day O'Connor, and in 1986 he could celebrate not only being promoted to Chief Justice (over great protests from Senate liberals) but also being joined on the bench by Antonin Scalia, that philosophical heir of Torquemada.

Clearly, the Court very much wanted to make life as difficult as possible for defendants. Preferably, to shut them out.

For instance, as we have seen over and over, the most authentic complaint that can be made by most condemned men is that they were given an incompetent defense attorney and therefore did not receive a constitutionally guaranteed fair trial. But the Court was tired of hearing that complaint, and in 1984 (*Strickland v. Washington*), it said the complaint would no longer be considered

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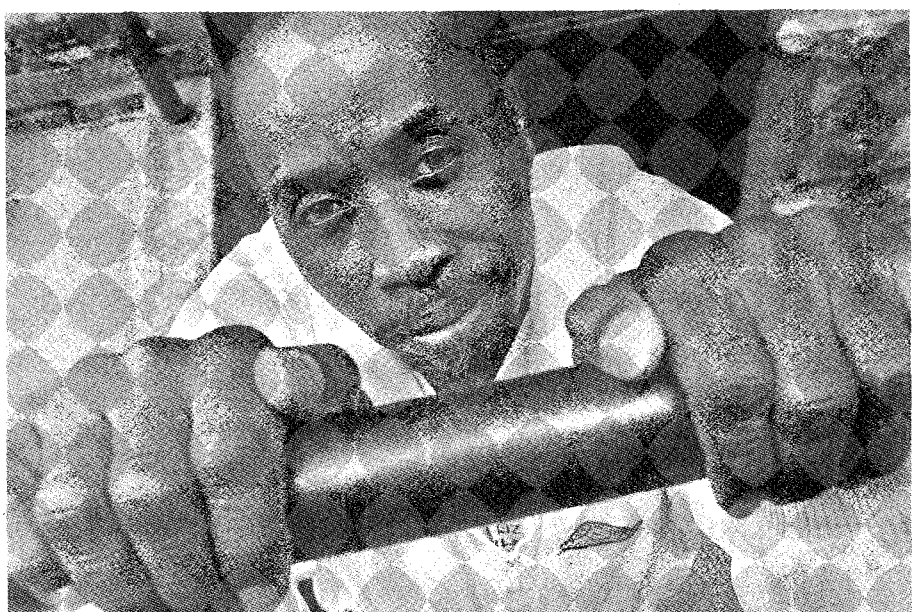
grounds for review unless the defendant's lawyer did such a lousy job that there was a "reasonable" likelihood that the lawyer's mistakes brought about the death sentence.

Well, specifically, just how bad could a trial attorney be and still not be considered "ineffective"? What if the lawyer slept through the trial? That is accepted as reasonably effective assistance. What if the attorney made no effort to bring in witnesses who could prove the defendant's innocence—as happened to Gary Graham—at the guilt stage of trial? That's OK, even though it's clearly malpractice. What if he didn't present any mitigating evidence—none at all—at the sentencing phase?



LOREN SANTOW/IMPACT VISUALS

Perry Cobb: sentenced to death October 1979, freed January 1987

That's OK too (*Burger v. Kemp*, 1987). In fact, since 1984 not one appeal based on ineffective assistance has been granted by the Supreme Court.

Other actions have almost shut the door on habeas corpus, which used to be a generously available way to cut through the bureaucratic bullshit and get to a hearing in federal court. Now, even if you come with a wagonload of evidence of your complete innocence, there are Congressional dictums and Supreme Court rulings that can be used to turn you away.

From Congress, with Clinton's blessing, came the Antiterrorism and Effective Death Penalty Act of 1996. This act, for the first time in history, sets a one-year deadline for filing a federal habeas corpus petition after the defendant has waded through the state appellate system. Furthermore, a federal court will no longer be allowed to review the fairness of a defendant's trial; instead, it will decide only whether the state court "unreasonably" applied federal law in denying the defendant's appeal. Federal courts, in short, are a rubber stamp to state actions in capital cases. Naturally, the Supreme Court has embraced the AEDPA's restrictions.

Three years earlier, the Rehnquist Court had already started slamming the door. In the infamous Texas case *Herrera v. Collins*, it declared that if a defendant has evidence showing his innocence, he has no right to a federal hearing unless he presented the evidence before the state's statutory cutoff date (in Texas, that's thirty days after the trial), unless the defendant presents a "truly persuasive show by clear and convincing evidence... that no reasonable juror would have found the defendant eligible for the death penalty."

Most legal scholars, reading between the lines, summarize *Herrera* as meaning it is not unconstitutional to execute an innocent man.

The practical effect of *Herrera* and the AEDPA is seen in the execution of Gary Graham. He was convicted and sentenced to death for fatally shooting a man in a Houston grocery-store parking lot in 1981. He was convicted almost solely on the testimony of a woman who said she saw Graham that night, but only fleetingly, through the windshield of her parked car. Graham's trial attorney conducted virtually no investigation and put on no witness during the guilt phase of the trial.

In 1993, however, Graham got help from some real attorneys, who found that police lab tests showed that the gun taken from Graham on the night of the murder was not the weapon that fired the fatal bullet. The new attorneys interviewed two employees of the store who had seen the murderer and were certain it wasn't Graham. Several of the original jurors came forward to state that they would not have convicted him if they had heard the testimony from the other eyewitnesses.

Too late. Graham's new evidence of innocence was offered after the mandatory cutoff date. He was executed this past June 22. *Herrera* and the AEDPA killed him.

In the *Herrera* decision, Chief Justice Rehnquist stated, perhaps in jest, that even if an innocent defendant could get no help from the courts, he could "file a request for executive clemency." Graham, as everyone knows, was dealing with a governor who did not believe in clemency. But, for that matter, few governors do.

The Young and Retarded Are Fair Game

Along the way the Rehnquist Court made such notable contributions to the uplift of society as ruling that the Constitution approved the execution of the mentally retarded and the execution of murderous 16-year-olds.

Admittedly, the mental defective who brought about one of those rulings, Johnny Paul Penry, is an exceedingly brutal guy. On the morning of October 25, 1979, he entered the home of Pamela Carpenter in Livingston, Texas, and beat her, stabbed her with scissors and raped her. She died a few hours later. He was on parole when he did it, having recently served time for a previous rape. By the death-penalty standards of any state, that crime would clearly have made any normal person eligible. But is capital punishment really meant for someone who has had organic brain damage from birth, has an IQ of between 50 and 63, is rated by clinical psychologists as having the mental age of a 6-and-a-half-year-old child and has been unable to finish the first grade?

In 1989, the Supreme Court said yes, it was constitutional (*Penry v. Lynaugh*).

Raising this issue on appeal for the penniless defendant was

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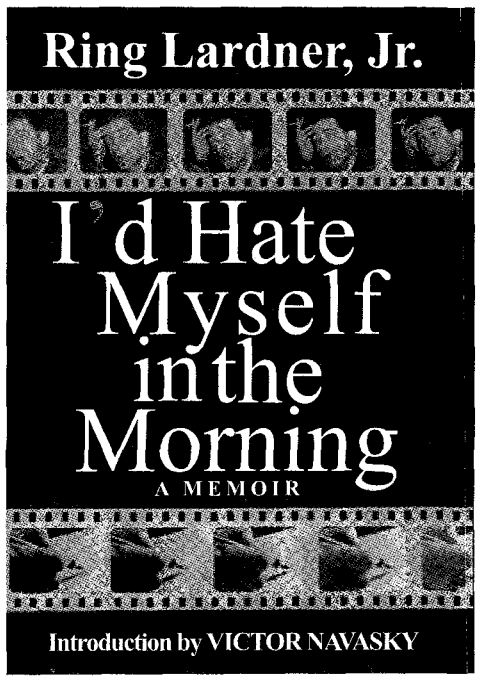

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a goodhearted but over-the-hill lawyer. His performance in presenting his plea to the US Supreme Court got this review from Alan Dershowitz:

> To say the least, his presentation was a disaster. The attorney spoke haltingly, and his words were difficult to understand. He seemed not to understand some of the justices' questions. When he did, he frequently gave the wrong answers. He couldn't find needed references. He became so bogged down in technical detail that Sandra Day O'Connor had to remind him, with only three minutes left in his argument time, that he had not addressed the main issues—whether it was constitutional to execute a mentally retarded prisoner.

Needless to say, the Court decided that Penry's death sentence was perfectly constitutional.

This was a rare instance of bad luck creating good luck. The deplorable defense Penry received got national attention and, as mentioned earlier, prompted one of New York's best law firms to come to his rescue. Spending hundreds of hours of pro bono time on his behalf, it has kept Penry's case alive, and Penry alive, too.

Actually, some states hadn't been holding off until they heard from the Court. They had been executing murderers with IQs in the 50s and 60s since 1984, and they still are. Some experts in mental retardation count thirty-four executions in this group so far.

As for teenagers, in 1988 the Court said Oklahoma couldn't execute someone who was under 16 at the time of the crime, but it was OK if Kentucky wanted to kill someone who was at least 16. But virtually all states have refused to even consider going below 17. Sixteen death rows now hold eighty men, a third of them in Texas, who were juveniles when they murdered. Since 1976, seventeen men have been executed for crimes committed when they were juveniles.

Anyone who has been keeping score on death penalties will not be surprised that most of these mental defectives and teenagers have dark skin.

Racism Wins Again

That brings us to what surely is one of the most indefensible judgments relating to race in the Court's history; no, not as vile as the "separate but equal" of *Plessy v. Ferguson*, but it spoke to the same junkyard justice that whites had historically reserved for blacks. The case was *McCleskey v. Kemp*, a Georgia case decided in 1987. If the Supreme Court never again within our lifetime takes up the question of cruel and unusual punishment, we can at least say that *McCleskey* closed that drama in a duplicitous style perfectly befitting the character of the Court.

Aside from the fact that McCleskey, a black man, was sentenced to die for killing a white person, the details of the crime and trial are not worth mentioning. All that really matters are the statistics compiled by law professor David Baldus, statistician George Woodworth and attorney Charles Pulaski Jr. for McCleskey's appeal, and the response of the Supreme Court's majority.

The Baldus study has been called "the most elaborate attempt ever made to show the disproportionately racial impact of

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any public policy." Examining more than 2,000 murder cases that took place in Georgia in the 1970s, it shows that people charged with killing whites were 4.3 times more likely to get a death sentence than those who killed blacks. Obviously, prosecutors and juries in Georgia didn't put a very high value on black lives. The death penalty was handed down in 22 percent of cases involving black defendants and white victims but in only 1 percent involving black defendants and black victims. The basis for McCleskey's appeal was that he was being discriminated against because of his race and because of the race of his victim, in violation of the Fourteenth Amendment, which promised equal justice. He asked that his death sentence be overturned.

Justice Powell, who had been a corporate lawyer for forty years in Richmond before being appointed to the Court by Nixon in 1971, wrote the lead opinion, joined by those other four pallbearers, Chief Justice Rehnquist and Justices White, O'Connor and Scalia. The opinion boiled down to this: (1) Just because blacks as a group are discriminated against doesn't mean that McCleskey can prove he was personally discriminated against. (2) The Baldus study may indicate "a discrepancy that appears to correlate with race," but "apparent disparities in sentencing are an inevitable part of our criminal justice system." Nobody's perfect. (3) Then Powell really got silly. If we let these blacks get by with claiming they were picked on because of their color, he said, the next thing you know, defense lawyers may start arguing that jury decision-making was influenced by such arbitrary variables as "the defendant's facial characteristics, or the physical attractiveness of the defendant or the victim."

Because the Supreme Court ruled stupidly in *McCleskey*, the nation's old race problem is now joined by a new one. Up to now, the debate has been over whether race dictates convictions in state murder trials. But the federal government has death-penalty statutes too, and although it hasn't executed anyone since John Kennedy was President, that seems about to change. Juan Raul Garza is scheduled to die next year. President Clinton put it off for his successor to handle because the case has brought international criticism. Garza is a migrant Mexican farmworker who became a big-time drug dealer, smuggling tons of marijuana from Mexico and, in the process, murdering three men in Texas. His lawyers don't claim he was innocent of that crime. They claim that the death penalty is unfairly applied by racially biased federal prosecutors. Garza is one of twenty men on federal death row. Sixteen are minority defendants (most are African-American). Gregory Wiercioch, a lawyer with the Texas Defender Service, wants to know why federal prosecutors asked for the death penalty for Garza but not for gringo defendants in a dozen cases like his—multiple drug-related murders. If the *McCleskey* decision had gone the other way, this kind of sordid pigment-counting would have been avoided.

If the *McCleskey* decision depresses you, let your depression be modified just a little by the fact that after its author, Justice Powell, retired, his biographer asked him if there were any votes he had made while on the Court that he would now change. Yes, he said: He would change *McCleskey*. He added, "I would [now] vote the other way on any capital case." He also admitted that at the time he wrote the opinion for *McCleskey*, he knew precious little about statistics. Ah, what might have been! If Powell

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had only had his change of heart before *McCleskey*, which, like most of the major death-penalty cases, was decided by one vote, 5 to 4, that case just might have sent such strong shock waves through the legal system that it would have wiped out capital punishment.

Another notable change of heart occurred, this one for Justice Blackmun. For years, though he said he was offended by the death penalty, he had voted to uphold it without blanching. Indeed, before reaching the Supreme Court, he even wrote an appellate court opinion upholding the death penalty for rape. But before he left the Court he was sick of all that. Better too late than never, perhaps, but the folks on death row probably don't see much difference between the two.

So what has the Supreme Court left us with? Hugo Adam Bedeau, one of the best scholars of this grim history, says, "We now have the most complex and cumbersome system for administering the death penalty the world has ever seen; it is neither fair nor efficient. Few like it, and the more familiarity one has with it, the less one finds to like about it."

Ironically, during the years when the Supreme Court was frantically trying to hold the jerry-built death penalty together, the nations we are most closely linked to—including Canada, Germany, France, Italy and Britain—were abolishing it.

Now, except for places like China, Iraq and Iran, we have it all to ourselves. But isn't that appropriate for the world's only superpower? ■

LETTERS
CONTINUED

(Continued From Page 2)

vate this problem, but voucher proponents have one thing right: Students do better in schools with other students who bring learning from home. Orfield's ideas for regional planning offer an actual solution to this national disaster—the reduction of concentrated poverty.

Walljasper concluded by suggesting we promote metropolitics as something "pragmatic" rather than just. I'm not sure, but it sounds like an underestimation. Increasingly, labor unions and environmental groups are forming blue-green alliances against sprawl, big-box employers, the defunding of mass transit and affordable housing, the lengthening of commuting time and the transfer of jobs to suburban ununionized companies. "Unions are basically an urban institution," Don Turner, president of the Chicago Federation of Labor told me in arguing for such efforts, which are being led by a group called Good Jobs First (www.goodjobsfirst.org).

At a national conference on living-wage campaigns in Baltimore recently, ACORN discussed building coalitions with environmentalists. Wade Rathke of ACORN and SEIU in New Orleans (where a living wage of $1 above the minimum wage will be on a ballot soon) said, "You cannot separate economic development from income policy." Other conferees recommended working for laws requiring economic development commissions to bring any decision above a certain dollar figure before elected officials for a public vote. In Minnesota a law now requires these commissions to establish criteria for giving out their (that is, the public's) money. With advocates for the working poor pushing such issues, it's hard not to see regional planning as a matter of justice. DAVID SWANSON

A KVITCH, A KVETCH, A KRECHTZ

Morris Plains, N.J.

■ Ilan Stavans criticizes Ruth Wisse for neglecting the Sephardic contribution to Jewish literature, but in his own anthology, *The Oxford Book of Jewish Stories*, less than 10 percent of the authors are Sephardic ["Mr. Sammler's Planet," Nov. 27]. There's a good reason, and it has nothing to do with bias. Modern Jewish literature flourished in Europe among Ashkenazic Jews, because of the influence of the Enlightenment. Few Sephardic Jews lived there. The heyday of Sephardic literature was the Golden Age in Spain, and US Jewish scholars have not neglected these writings, as Stavans claims. They can be found in well-known sources, including Lewis Browne's *The Wisdom of Israel*, Nahum Glatzer's *The Judaic Tradition* and Nathan Ausubel's *A Treasury of Jewish Poetry*.

Stavans's claim that Jews have not created their own literary canon is also questionable. In addition to his own anthology, which Stavans is perhaps too modest to mention, there are excellent collections edited by Joseph Leftwich, Leo W. Schwarz and Saul Bellow.

Other peculiarities in his review include his characterization of Bialik, the Hebrew poet, as "proto-Zionist" and Wisse's book as "proto-Ashkenazic." In both cases, the prefix "proto" is superfluous. Finally the first name of Peretz, the Yiddish writer, can be written as Yitchak or Isaac, but never "Itzjak," and *kvetch* is a perfectly good Yiddish word, not "Yinglish." So please accept this *kvetch* as an antidote to Stavans's. BENNETT MURASKIN

GIVE THE FALUN GONG A BREAK

New York City

■ Something weird happens to people of the left persuasion when they travel to countries flying the red star (I know, it happened to me). They tend to lose perspective, as has my old pal Christopher Hitchens, judging by his vitriolic put-down of Falun Gong ["Minority Report," Nov. 20]. How odd that he echoes the language of a Chinese Communist Party campaign of defamation, cult-bashing and false allegations in a crackdown even Hitch calls "clumsy" and "probably counterproductive" (probably?).

Yo, brother, we are talking about more than seventy people dead in police custody so far, and as many as 50,000 detained, many of them subjected to torture and abuse (including being involuntarily tossed into mental hospitals). I have just published *Falun Gong's Challenge to China* (Akashic Books) and have also produced a film by the same title, which offer an independent assessment of this crisis.

In all my research, I didn't find a shred of evidence to substantiate the state media's accusations that Falun Gong founder Li Hongzhi has used "tricks" to "induce the credulous to part with their money" (Hitchens's words, though they sound like they come from Beijing's *People's Daily*) or to suggest that these nonviolent practitioners have been programmed to protest. (Remember the civil rights movement?) Ironically, many are pro-party and pro-government and have been appealing for justice from a regime that won't hear them. These folks preach tolerance and compassion. How about showing some? DANNY SCHECHTER

HITCHENS REPLIES

Washington, D.C.

■ Danny Schechter—who is not my old pal—can certainly speak for himself when it comes to credulity. He fell for everything from the Khmer Rouge to Clinton, and now the Falun Gong has helped him get in touch with his inner swastika. Check out the FG website (www.falundafa.org) if you think I jest. CHRISTOPHER HITCHENS

PRONOUNCE IT 'PERFECTION'

Santa Rosa, Calif.

■ After all these years of wondering, I finally have heard the way to say "Klawans"! The eminent film critic would not divulge this information when a reader wrote in some time back ["Letters," July 19, 1999]. Many of us consider Mr. K the best movie critic in the (small n) nation if not the world, so now when we read a review in his excellent style, we'll know it's Kla-*wans*. Anyway, so said the MC introducing him during the TMC movie classics program.
CELIA TALBOT

New York City

■ If you ever fire Stuart Klawans as your reviewer, I'll drop your rag like a Republican Party membership card. In a world gone mad, he is my only idol. CARL SKUTSCH

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BOOKS & THE ARTS

Speak, Memory!

DAN WAKEFIELD

CHERRY.
By Mary Karr.
Viking. 276 pp. $24.95.

ON WRITING.
By Stephen King.
Scribners. 288 pp. $25.

GHOST LIGHT.
By Frank Rich.
Random House. 311 pp. $24.95.

A woman left her abusive husband in the middle of the night and, taking their 3-year-old son with her, drove through the dark from Ohio to Boston, reaching across the boy to hold the broken handle on the passenger door to make sure he didn't fall out. The scene stuck with me, like many others I heard in workshops I began leading in writing autobiography a decade or so ago. It seemed to me that these true stories, personal slices of American life, conveyed the feel and taste and sense of this society more faithfully and compellingly than the novels I used to count on for such understanding. Current novels continue to seem to me less revealing of "the way we live now" than the best of the memoirs that appear with increasing regularity on bookshelves and even bestseller lists.

The breakthrough contemporary memoir was Mary Karr's *The Liars' Club* in 1995, accelerating what was already a popular trend and upping the literary stakes of the genre by the poetic precision of its language and the headlong thrust of its narrative. Now she is back with a sequel to her childhood, the adolescent era whose major symbolic (as well as physical/mental/emotional/psychic) event was losing one's virginity. In typical Karr-like celebration of the vernacular, the title, of course, is *Cherry*.

If her second effort is not as uniquely satisfying as the first, it is not because Karr has lost any of her considerable powers as a prose stylist or suffered from the ancient curse that allegedly plagues any follow-up with mediocrity. The problem—or at least the difference—is simply that *The Liars' Club* was based not only on the author's experience but on the soap-operatic adventures of her boozing, man-loving, peregrinating mother. Mary's mom not only blessed her with life but also with as colorful a ready-made character as any author-daughter could wish for to star in her first memoir. Like Mary as a child and her sister, Lecia, the reader of *The Liars' Club* is carried along by their mother's dramatic ups and downs and outs, providing in the process plenty of plot. Agnes Nixon, creator of the longtime favorite soap opera *All My Children* (as well as nearly the entire ABC lineup of daytime drama) once defined the basic rule of plot as "the heroine must always be in peril," and Mary's mother followed that rule.

King, a populist writer as well as a popular one, believes 'large numbers of people have at least some talent as writers and storytellers.'

Focusing this time on adolescence, Karr is true to the inherent ennui of the teenage years, which means that *Cherry* is long on mood and short on plot (for one thing, Mom stays put in this era). Karr explains that "no long episodes from that dull time exist.... There are only brief snippets of memory, outtakes, captured instants where your sagging performance becomes plain." Her teenage best friend shares with teenage Mary "a monastic passion for doing virtually nothing." Reflecting on that era of her life the author reports that "a camera trailing you would find neither plot nor action—two girls laze around on sofas at various stages of torpor reading or talking about what they will read or have read or plan to write or make or do in some vaporous future."

True as this is to adolescent life, and as artfully as it is described, torpor is

Dan Wakefield's memoirs include New York in the Fifties, *which was recently made into a documentary film.*

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hardly riveting. Nor does the small-town East Texas setting of Leechfield provide much to write from home about, "with its mind-crushing atmosphere of sameness.... Sometimes you even fancied you could hear the traffic light over deserted main street blink. Time lagged mule-like in muddy tracks."

As if to compensate for the lack of action or drama in her story, Karr jazzes things up with a barrage of the sexual slang of time and place. She tells us of boys "talking about how they finger-fucked you and your ying-yang made their hand smell like tuna fish," a "dick hard as a crescent wrench," a girl whose "knockers" are like "headlights," another who "yanks both her pants and undersancies down," and wonders how Wonder Woman "keeps her D-cup boobs from flopping out of the red strapless bra top she's got on," while "your mother holds loudly forth on any and all pussy-related subjects," and you call your sister "Old moose-boobs." Sexual lore is passed on and learned ("After a date, throw your panties against the wall, and if they stick, you had a good time") as well as proposed initiation rites for a teen sex club ("Blindfold Davie Ray Hawks and tell him he's putting his finger up somebody's butt, but really it's just wet bread wadded up in a soup can"). As Karr puts it, "I had a lot of double-dog fuck-you in me by then."

As well as employing a blitz of teen sex slang, Karr sometimes slips into a kind of collegiate cuteness as she looks back at her adolescent self: "The stoicism I favored was less in the mode of Marcus Aurelius and more reminiscent of the donkey Eeyore from *Winnie the Pooh*."

But just as she seems to be bogging down in the mire of teenage torpor, dutifully slogging on to close out this era of her experience, Karr taps into a real narrative that gathers speed and carries us breathless to the end. It happens when

> one legendary night you travel to Effie's Go-Go, a black juke joint in the bowels of Beaumont behind the shipyards where no underage girl of any color should be granted admission. You drive there flaming so luminously on orange sunshine that dark trees on the roadside seem to rear back to let you pass, and your bare arms and hands glow in the car's hull like fine marble.

Karr returns from what seems a near-death acid trip with the hallucinated illusion that she has found the meaning of life, reduced to one sentence, only to realize it's the kind of commonplace Grandma might have stitched on a pillow. After sharing her revelation with her best friend, adolescent Mary comes down from her illusory nirvana, and Karr the writer looks back to see that

> what's unalterable as bronze, though, is the image of your radiant friend that morning barefoot on the porch with sun in her rampant hair. She's holding out that bowl of Froot Loops and touching your shoulder as if to bestow the right name upon you, the one you'll bear before you through the world, each letter forged into a gleaming shield.

Stephen King, author of thirty "worldwide bestsellers," was "stunned" by *The Liars' Club*, and his admiration for the "beauty" and "ferocity" of Karr's memoir seems to have inspired him to try his own, yet he feels he lacks the "totality" of her memory. His own "herky-jerky childhood" seems to him more like "a fogged out landscape from which occasional memories appear like isolated trees...the kind that look like they might like to grab and eat you." His father "did a runout" after piling up a lot of bills when Stephen was 2, and he was raised by his mother, moving around to different relatives and different jobs in different places, trying to keep it all together.

King stresses that his own *On Writing* is "not an autobiography" but "a kind of curriculum vitae—my attempt to show how one writer was formed." It is also an attempt to help aspiring writers with advice, counsel, exercises in writing and even an offer of personal criticism:

> When you finish your exercise, drop me a line at www.stephenking.com and tell me how it worked for you. I can't promise to vet every reply, but I *can* promise to read at least some of your adventures with great interest.

King is not only a popular but also a populist writer who believes that "large numbers of people have at least some talent as writers and storytellers, and that these talents can be strengthened and sharpened." And he seems to have written this book primarily for the purpose of helping them. Maybe this generosity of spirit comes from memories of his own down-and-almost-out days, when he pieced together a living teaching high school English and writing stories for magazines like *Cavalier* at night and on weekends, barely able to pay for his daughter's needed medicine.

Prickly from nonappreciation by the literary high priests, King complains that "critics and scholars have always been suspicious of popular success" and cites Dickens, "the Shakespeare of the novel," as a victim of "constant critical attack" because of his "sensational subject matter," his prolific output and, "of course, his success with the book-reading groundlings of his time."

It is to the groundlings that King speaks here, not in the memoir-writing manner he admires in Karr, who shapes and re-creates experience into novelistic scenes and dialogue, but rather in chatty, informal talk. Perhaps the best of that talk—and the most useful—is on one of the subjects King feels most strongly about, his own recovery from drugs and booze, and the mythology of those substances as useful muses.

King had fallen so far into addiction that "in the spring and summer of 1986 I wrote *The Tommyknockers*, often working until midnight with my heart running at a hundred and thirty beats a minute and cotton swabs stuck up my nose to stem the coke-induced bleeding." The intervention that saved him was organized by his wife, Tabitha, who emerges as King's favorite character in this book as in his life. Mrs. King and his children gave him the ultimatum of rehab or leave, and he chose life.

"The idea that creative endeavor and mind-altering substances are entwined is one of the great pop-intellectual myths of our time," King writes.

> Substance abusing writers are just substance abusers—common garden variety drunks and druggies, in other words. Any claims that the drugs and alcohol are necessary to dull a finer sensibility are just the usual self-serving bullshit. I've heard alcoholic snowplow drivers make the same claim, that they drink to still the demons.

If his prose lacks the beauty he admired in Karr's memoir of her childhood (a gift, I suspect, that can't be taught), King dispenses good common sense on life as well as writing.

The calling that led to Frank Rich's career as chief drama critic of the *New York Times* not only helped him survive a turbulent childhood but provides the theme and narrative line of his memoir: "I was now destined to trace my childhood almost exclusively through an accelerating progression of plays, good and bad, that would captivate and kidnap me in circumstances both mundane and dramatic, in different cities, in the com-

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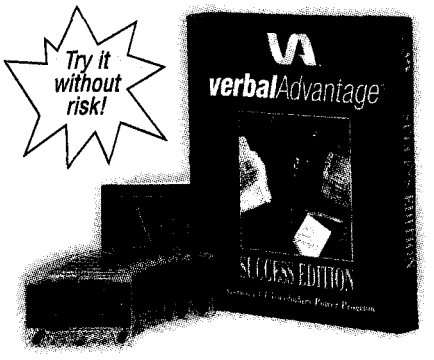

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pany of a multitude of audiences."

More than the story of Rich's childhood and adolescence, *Ghost Light* could well be described as the memoir of a calling. It began even before he was born, when his mother felt "transformed" by the songs of *South Pacific*, the premier musical of its era (and perhaps of the entire American theater). She listened to the record "over and over, she liked to recall, when it was time to go to the hospital and have her first baby." One of the child's earliest memories was of his mother singing songs from the musical and playing the record, explaining that it was from a Broadway "show" in New York and therefore "magical" to her; and so, it turns out, to her son.

Successive records of musical shows his parents brought home heightened the child's fascination, and though Broadway was far from his suburban DC home, young Frank was taken to a road company performance of *Damn Yankees* at Washington's venerable National Theatre. He went home to play the record and relive the show, wanting to learn "how each piece of the whole big Tinkertoy worked."

The "ghost light" of the title refers to the old theatrical superstition that if the stage is left dark a ghost will move in, so a single bulb is kept burning at center stage after everyone goes home. The term also has an eerie relevance to this memoir, for the author as a child suffered from night fears and insomnia, and a truly fearful menace entered his life when his mother remarried. Rich's mercurial stepfather, Joel, at first bears a harrowing resemblance to the nightmarish stepfather of another compelling memoir of the first rank, Tobias Wolfe's *This Boy's Life*.

The wheeling and dealing, larger-than-life lawyer Joel was alternately generous and abusive with his own children as well as his new wife and son. Though he never physically attacked Frank's sister, he lashed out at the boy in brutal scenes like this one in front of a crowd of onlookers at a family summer camp:

> Joel slapped me to the ground with his huge hand. My brain felt as if it was knocking against my head. Then he grabbed me by the ankles and started dragging me up the road on my back, the dirt and gravel scraping against my skin. We were at the next building—some fifty yards away—before he dropped me in a heap in the center of the road.

Yet unlike Tobias Wolfe's stepfather, the volatile Joel was supportive and encouraging of Rich's talent and ambition, taking him to the theater, sending him to New York with tickets for Broadway plays, cheering his achievements and acceptance to Harvard. Rich is somehow able to give a balanced portrait of this brilliant and deeply troubled man who ended in a nursing home with terminal dementia.

Through the tension and fears of his stepfather's outbursts and his mother's tears, the theater served as solace, haven and home. When he got his first job as an usher at the National Theatre in high school and walked past the line of ticket buyers, he felt as if "some powerful, nameless spirit were rising within me, raising my whole being to a more elevated place, the sort of heaven people talked about in religious school but that I had never glimpsed before." He knew from then on that no matter what bad scenes erupted at home, "whatever else happened, I'd be remembered at the National Theatre and be at home there, if nowhere else."

Rich is able to convey the excitement for the theater he felt as a child, watching spellbound as

> The lights shining on the curtain dimmed, too, plunging the theater into complete darkness. Then, just when the suspense became overwhelming, the whole audience holding its breath, the curtain did rise, ascending heavenward so fast (where did it go?) and revealing such an explosive cacophony of light and costumes and people singing and dancing that it was more than I could absorb. The whole whirligig of sights and sounds and bodies rushing forward seemed to be aimed directly at me.

The words of his compelling memoir seem aimed directly at us. Perhaps it's that quality of direct experience, without the artifice of fiction, that makes the memoir so popular now and has earned it a respected place in our literature. ■

The Last Edwardian

ERIC WEINBERGER

THE HILL BACHELORS. By William Trevor. Viking. 245 pp. $22.95.

William Trevor is in some ways the last Edwardian. The shabby-genteel elegance is always there, the archaic turns of speech, the fraying tweeds and musty old homes full of knickknacks, the family heirlooms dusting over in cupboards and attic closets, on window sills. Trevor's characters often have something anachronistic about them; even if tolerably comfortable in their skins, they are seldom so in their times. And yet few story writers are so timely. Trevor, who has been publishing story collections for more than thirty years (*The Hill Bachelors* is his ninth; *The Day We Got Drunk on Cake*, his first, was published in 1967), somehow knows the world of urban down-and-outs, the contemporary Britain to which US Anglophiles are blind: the greasy curry houses, tattered news agents and rundown off-licenses of the high street; the sour industrial hinterlands of *Felicia's Journey*; the drab cavernous railway and tube stations of *Death in Summer*; the blaring pop music that is the city's perennial soundtrack. Trevor has written stories of Northern Ireland's Troubles that are contemporary and unutterably poignant, like "Lost Ground" in his previous collection, *After Rain*; and "The Mourning," in *The Hill Bachelors*; also "Against the Odds," with its hint of the breakdown of the Good Friday Agreement, its mention of Drumcree and Omagh.

The modern world is bearing down relentlessly on Trevor's characters, and most are overwhelmed. To recoil from sex, any intimacy, is an instinctive move against annihilation. When it happens at all, it takes on an unusually decorous edge. In "Lovers of Their Time," from the 1978 volume of that name, illicit sex loses all sense of sweat or fear or reckless abandonment; the prevailing image is of a sumptuous hotel bathroom with "delicately veined marble and the great brass taps, and the bath that was big enough for two," with the Beatles playing "Eleanor Rigby" and Union Jack–bedecked mods sauntering down Carnaby Street. Lacking eroticism of any flavor, it is vaguely unreal; it seems mistaken.

Yet this story is the exception. For Trevor, a paralyzing detachment coupled with the terrors of sexual yearning is more usual. A classic story of his is "In Isfahan,"

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from *Angels at the Ritz and Other Stories* (1975), where a lone English traveler falters at a very real romantic possibility he has surrendered for no good reason other than his fear:

> It was a story no better than hers, certainly as unpleasant. Yet he hadn't had the courage to tell it because it cast him in a certain light. He travelled easily, moving over surfaces and revealing only surfaces himself. He was acceptable as a stranger: in two marriages he had not been forgiven for turning out to be different from what he seemed.

Still he has his chance: He can dress, chase the woman down at the bus station, persuade her to stay, travel with her to Shiraz, "city of wine and roses and nightingales." None of that; he hasn't the courage. The story ends: "He was the stuff of fantasy. She had quality, he had none."

Trevor has been rewriting the same story ever since. It is the avoidance of confrontation, the concealment of true feeling, the traveling in surfaces, mistaken for privacy. The difference now is that his characters have attained quality, the "stuff of fantasy" dissipating with the times.

One of the more celebrated Irish novels of recent years, John McGahern's *Amongst Women*, ends with a country funeral; the title story of *The Hill Bachelors* begins with one. The cast is nearly the same as McGahern's: The family tyrant is dead, leaving a widow; the children, a looked-down-upon son among them, return from their far-flung livings (Dublin, other parts of Ireland, Boston) and just as quickly take off again, having sorted out their mother with a little help around the farm and arranged for a neighbor to look in from time to time. For years they have known there is no life for them there. The outcast son stays behind, however. For his mother, who has never really known him, it is a pleasant surprise, and she is complimented on her good fortune by the parish priest. "Isn't he the good boy to you?" remarks Father Kinally. "Isn't it grand the way it's turned out for you?" Yet the son knows otherwise: "Guilt was misplaced, goodness hardly came into it." He has become one of the hill bachelors, forever unmarrying—no woman will have him now. "Enduring, unchanging, the hills had waited for him, claiming one of their own."

This is the significant departure from McGahern (author of a novel called *The Pornographer*), who writes with the hair-raising *frisson* of the erotic, whose characters are carnal in their desires and attainments. One should count sometime how many sexually forlorn characters there are in a volume of Trevor stories, by way of contrast: the virginal, the celibate, the asexual—the men or women, it is clear, who will never marry, never couple; the ones for whom the carnal urge has forever left, even if at one time they had it. In *The Hill Bachelors* seven of its dozen stories prominently feature such characters. These people are not always priests, although, of course, some are. There is Michingthorpe, the eponymous "A Friend in the Trade," who might in his late middle age still be a virgin; the celibate Protestant clergyman Grattan Fitzmaurice in "Of the Cloth," keeping company with Father Leahy, whose joint affirmation that they have never left Ireland ("I have never been outside it") might speak equally for other deprivations in their lives; Vera in "Three People," whose elderly father knows she "will be alone for the rest of her days." Sexual frustration might be one of the reasons driving the laborer Liam Pat Brogan back to Ireland from the London building sites at which he toils in "The Mourning." When he opens his Irish mouth, girls turn away. His mourning, which is of several kinds, all "lonely and private," will never leave him, it is implied; this too might speak for another loneliness and isolation that is the peculiar sexual geography of William Trevor.

Irish writers are usually more red-blooded, even lusty. One thinks not only of McGahern but also of Joyce, O'Casey, Edna O'Brien. But Trevor is unlike other Irish writers: a Protestant, for starters, and a long-term émigré, living in England for over forty years. Other Irish writers who are exiles have tended to flee the smothering influence of the British Isles; Trevor rather bravely has embraced it, becoming something in between Irish and British. Among prominent English-language writers it is a territory inhabited only by himself, and his most deeply felt fiction reflects its author's aloneness. The man is standing still, but still reaching out.

In *The Hill Bachelors* bravery takes on a certain passivity and becomes nobility. In "Death of a Professor," a scholarly victim of a prank (Trevor has been here before with his academic hoaxes: Witness "Two More Gallants" in *The News From Ireland*) carefully reviews his life, wondering how he has become hated: "He is not arrogant that he's aware of, or aloof among his students; he does not seek to put them in their place." A proud Ulster widower, victim of a more serious treachery from a Belfast woman in "Against the Odds," feels himself

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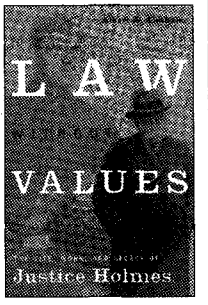

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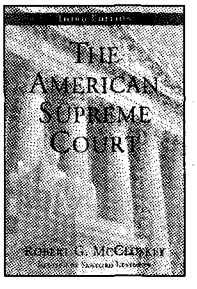

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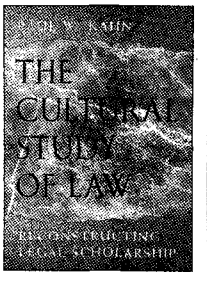

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a fool ("His resistance had been there, he had let it slip away") but nevertheless puts on his suit on the day of their rendezvous: "He waited for an hour in their corner of the bar, believing that against the odds there might somehow be an explanation."

What redeems the men is kindliness or patience or some similar quality; for the widower it is "a flicker of optimism, although he did not know where it came from or even if what it promised was sensible. He did not dwell upon his mood; it was simply there." For the professor, in the eyes of his wife, it is not brains or skill or knowing a lot but wisdom, "almost indefinable, what a roadworker might have, a cinema usher or a clergyman, or a child." This voice is that of an old-fashioned moralist: humble, rather shy, uninterested in success and accomplishment and fulfillment as we perceive it nowadays. Dignity instead emerges from within and remains private, known only to loved ones or, if there are none, to the self. A good part of life is keeping secrets: Vera's in "Three People," the laborer Liam Pat's in "The Mourning" and (a rare foreign protagonist) the Frenchman Guy's in "Le Visiteur." Retreating from an awkward encounter with a married woman traveling with her stone-drunk husband, Guy sits

> down among the rocks, wondering if he would tell anyone, and if he did, how exactly he would put it. It was how they lived, he might say; it was how they belonged to one another, not that he understood. In the cold moonlight he felt his solitude a comfort.

The oddest story in *The Hill Bachelors* is "The Virgin's Gift," an allegory set in Ireland's premechanical, possibly medieval past, where the gift of the Virgin's first visitation to a young man named Michael is solitude. First he is sent to an abbey, which means breaking with his love, a girl named Fódla; then to an island off Ireland's coast, where he will be truly alone. He is happy there, loving his solitude, and resents the Virgin's final visitation when instructed that he must leave it. There is a purpose, of course: a return home to his elderly parents, his father now blind, the farm fallen to pieces. The moment—"the gift of a son given again"—is quiet, not sensational: "No choirs sang, there was no sudden splendour, only limbs racked by toil in a smoky hovel, a hand that blindly searched the air." It makes perfect sense for Trevor—homecoming is a triumph allowed even the defeated, as we know from Robert Frost: "the place where, when you have to go there,/ they have to take you in." Frost's was a sexless creature, too, the old hired hand coming home to die, without a past that implies at all the intimate mark of other people.

The Hill Bachelors is mostly, too, a book of homecomings. Paulie in the title story comes home in the literal sense; so too Liam Pat. The happily married couple of "A Friend in the Trade" sell their London home in which they have raised three children; yet the home to which they will retire—an oast-house in rural Sussex—will, it seems, be a more private and intimate place for the two of them than their city home has ever been, with its frequent visitor and interloper Michingthorpe.

There is no sense that William Trevor, who is 72, is about to give up writing; yet in nearly every tale in this collection there is a hint of his valediction: that his characters, whether they live or die, are alone or intimately involved, have come home to rest and so too has their author. A fine and careful writer, master of the perfectly oblique sentence, the sly and compassionate aside, rarely arouses himself to something approaching a speech, a pronouncement on the times. More common is the terse peroration, as in the finale of "Of the Cloth":

Unsolicited Survey

Have you been there?
If so, can you describe the shape of the shadows?
When you entered, did anyone greet you?
Did the moss hug your foot or a jay screech in your ear?
Were you afraid you would not get back?
Did they ring a bell?
How many times, and what did it sound like?
Did a horse bow its head by the side of a road?
Did a single feather lie at the clearing?
Did a green wave cascade into a grove?
Did the flavor of light infect your sleep?
Did a toad leap from the dust onto a twig?
Did deer turn in terror as you passed?
Did a doe lick your hand and find you wanting?
Did you behold a flower that cannot fade?
Was the sky so empty that you fell upward?

Did the needles of a pine tickle your nose?
Did you sniff the ghost of the cedars of Lebanon?
Did you follow a petal blown to the edge of the sea?
Did you wake with a sheet twisted around your throat?
Did you call out?
Did you kneel at a blade of grass or at the mound of an anthill?
Did you ask for a way in or a way out?
Did a bough sway imperceptibly?
Did you rest your hand on the shoulder of a god?
Did you open a piece of fruit and offer a portion of it to the sun?
How long did it take to finish, and were you satisfied?
Did a fly sip some water from a stone?
Did you touch the haze on a plum, its blue cloud?
Did you rub its skin until it lost its bloom?
Did the day burn in a crow's eye?
Were the stars so clear another heaven appeared behind them?
Did you hear the wind consoling the leaves?
Did you look inside the cap of a mushroom, and part the curtain of disbelief?

Phillis Levin

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"Small gestures mattered now, and statements in the dark were a way to keep the faith." And yet in "Against the Odds" we have epiphany presented newsreel-style, the *March of Time*, the broad, wet stroke of the brush from the exacting miniaturist:

> The troubles had returned since Mrs Kincaid had travelled back to Belfast. There had been murder and punishment, the burning of churches, the barricades at Drumcree, the destruction of the town of Omagh. Yet belief in the fragile peace persisted, too precious after so long to abandon. Stubbornly the people of the troubles honoured the hope that had spread among them, fierce in their clamour that it should not go away. In spite of the quiet made noisy again, its benign infection had reached out for Blakely; it did so for Mrs Kincaid also, even though her trouble was her own. Weary at last of making entries in a notebook, she wrote her letter.

It is not Trevor's finest writing: too general, too rushed, too naïve, perhaps, even untrue; a writer who has visited with pinpoint precision his character's deepest fears and isolation is not likely to seem so hopeful about the fate of nations. Yet in its generosity, its kindness, its making the general personal, domestic ("Weary at last...she wrote her letter"), its final ambiguousness, it is unambiguously William Trevor's, a landmark in the terrain he has mapped out for us in thirty years of telling stories. In anticipation of when he will finally leave us, we have the words from another story in this collection: "The long acquaintanceship seems already over, the geography of their lives no longer able to contain it." ■

A Tale of Two Venonas

STEPHEN SCHWARTZ

THE VENONA SECRETS: Exposing Soviet Espionage and America's Traitors.
Herbert Romerstein and Eric Breindel. Regnery. 608 pp. $29.95.

If book publishing were subject to truth-in-labeling laws—a concept we should all abominate—Herbert Romerstein would be in serious trouble.

First, this book presents itself as jointly written by Romerstein, a veteran federal investigator of Soviet activities in the United States, and the late *New York Post* editorial-page editor Eric Breindel. But I could find no evidence whatever of textual input by Breindel in this volume, which appears two and a half years after he died. Love him or hate him (and I am fairly certain most *Nation* readers fall in the latter category), Breindel was a working journalist who knew how to write. However, this production is so leaden, prosaic and perfunctory it is hard to imagine a professional scribe having had anything to do with it. It reads like a printout of several government reports, strung together.

Further, it offers very little that is new about the Venona program, a US-run interception and decryption of some 2,900 secret Soviet communications originally transmitted in the 1940s. Nearly everything important to be said about this phenomenon, from an anti-Soviet perspective, was published in *Venona: Decoding Soviet Espionage in America*, a meticulous and detailed examination by the historians John Earl Haynes and Harvey Klehr, issued by Yale University Press in 1999 [see Walter Schneir and Miriam Schneir, "Cables Coming in From the Cold," July 5, 1999].

This is not to say there is nothing new or interesting in this book. In addition to Venona, Romerstein has trolled through other US files, as well as the "MASK" decryptions, Soviet communications captured by the British intelligence before World War II, and he has dipped into Soviet and East German archives, although in a haphazard way. But because Romerstein's approach is only thorough in certain instances, he leaves some useful items hanging, unelucidated.

One of these involves the disappearance, in Barcelona during the Spanish Civil War, of Mark Rein, son of the exiled Russian Menshevik Rafail Abramovich. Rein was associated with Scandinavian social

Stephen Schwartz lived for the past eighteen months in Bosnia-Herzegovina and Kosovo working as a freelance journalist and consultant on press-freedom issues, labor reform and interreligious affairs. His latest book, Intellectuals and Assassins, *was just published by Anthem Press in Britain.*

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democracy when he vanished in wartime Catalonia. His case is one of a short list of unsolved atrocities alleged against the Soviet secret police on Spanish Republican territory. According to Romerstein, Rein may have been betrayed to Stalin's agents by a German leftist named Paul Hagen. A footnote discloses that sources on the Rein affair may be found in the German Communist Party Archives. (Hagen is discussed in a recent work that, although self-published, is written to a high standard and is of considerable interest, *Wilhelm Reich and the Cold War,* by Jim Martin. For information, see flatlandbooks.com.)

But Romerstein handles this revelation—which, although significant, has very little to do with Venona—in a sloppy and incomplete way because such episodes, and indeed, Venona itself, are not what really interests him. Romerstein is a man of obsessions, and his obsessions are familiar to *Nation* readers. The main example in this book involves his crusade to incriminate the journalist I.F. Stone as a Soviet spy.

Romerstein has previously been burned by this topic [see D.D. Guttenplan, "Izzy an Agent?" August 3/10, 1992; Romerstein's letter in response and Guttenplan's "Stone Unturned," September 28, 1992; and Walter Schneir and Miriam Schneir's "Stone Miscast," November 4, 1996]. But caution and precision are not his touchstones, as his argument on Stone exemplifies.

As shown in the Venona messages, Stone rebuffed Soviet attempts to enlist him, although one Soviet report states that the journalist "would not be averse to having a supplementary income." However, there is no evidence that any money ever changed hands or that Stone was alluding to anything other than, for example, Soviet translation and publication of his work by the news agency TASS, which was the cover under which some agents in New York worked. Haynes and Klehr dealt with Stone's appearance in these messages with laudable objectivity, declaring, "There is no evidence in Venona that Stone ever was recruited by the KGB."

Yet Romerstein seems determined to smear Stone whether or not he can prove his charges. According to him, an NKVD "business" relationship with Stone "worked out" when at the end of 1944 "a group of journalists, including Stone, provided [Soviet spy Vladimir] Pravdin with information" about US military plans in fighting the Germans. At the end of the paragraph, Romerstein breezily admits that the journalists in the group, aside from Stone, were not spies and did not know that Pravdin was a spy. Nor is there any indication the information they transmitted was secret.

Thus, there was nothing questionable about these American journalists briefing a Soviet colleague. Still, according to Romerstein, because "Stone knew full well" that Pravdin was a spy, the incident was "evidence that Stone was indeed a Soviet agent." But given that so many top Soviet representatives in America were spies, and that a considerable number of intelligent people knew this or took it for granted, what difference did it make?

The remainder of Romerstein's summary case against Stone consists of some garbled gossip by Russian retired spy Oleg Kalugin, which Kalugin himself disclaimed, followed by an absurdly convoluted and arbitrary argument. Romerstein points out that Soviet agents referred to Stone by the code alias "Blin," the Russian word for pancake, from which the word "blintz" is derived. He then notes that in 1951 Stone complained in a column that he would not be surprised to be accused in the anti-Communist press of having been "smuggled in from Pinsk in a carton of blintzes." To Romerstein, this is not only a dead giveaway, it is the clincher.

He writes, "Intelligence tradecraft requires that agents not know their codenames, but as *Venona* revealed, in a number of cases it seems some did." He continues, apparently on no evidence whatever, "Stone was one of them. His inside joke was odd. You might talk about smuggling something from Russia in a vodka bottle or caviar jar or some other normal Soviet export, but blintzes?" Well, Izzy Stone was diminutive, but he wouldn't have fit in either a bottle of booze or a can of caviar.

All this goes far beyond stretching the truth in the interest of ideology. One could say that when inquisitors like Romerstein are reduced to deconstructing wisecracks, Marx's famous transition from tragedy to farce has come into full effect. But the overall enterprise pursued by Romerstein remains both historically meretricious and socially evil, in that it obstructs meaningful debate on meaningful issues, of which the activities of Soviet secret agents in the West is certainly one.

One might also dismiss Romerstein as a McCarthyite, but that would be a mistake. Romerstein is not a McCarthy—that is, a hysteric lashing out at perceived enemies. He is something worse: a Stalinist who changed sides and joined the West, without changing his essential mindset. The fabrication of arguments like those presented against I.F. Stone, based on attempts to read nonexistent significance into trivial details, is reminiscent of nothing so much as the Soviet demonization of Trotskyists, Mensheviks, anarchists and other alleged counterrevolutionaries. Indeed, this method is typically visible in the hallucinated docu-

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EDUARDO GALEANO

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Celebrating that epic feat and carried away with anatomical exhilaration, Uruguayan politician Adauto Puñales thundered: "Communism is an octopus that has its head in Moscow and its testicles everywhere!"

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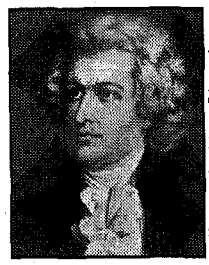

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ments of the Moscow trials, in Chinese denunciations during the Cultural Revolution, in the interrogations practiced under Pol Pot in Cambodia, in American conspiracy literature and, in the KGB canon, in the writings of Herbert Romerstein.

Haynes and Klehr showed that Venona represents a documentary resource that historians of the twentieth-century left can ignore only at considerable risk. Venona materials interpreted as referring to the Rosenbergs and Alger Hiss cannot be dismissed. More, the attempt by some historians to discredit the Venona communications as bragging and exaggeration by Soviet operatives runs up against a notable aspect of Soviet intelligence history. The Russian security organs, unlike the US and British agencies, underwent a series of purges in the late 1930s that can only be described as wholesale massacres.

The ferocity of these murderous campaigns impelled the most important defectors from Soviet service in the 1930s to flee their fellow agents or "go private," in the parlance of the secret police. These included Ignacy Porecki, *a k a* Reiss, murdered within three months of his break with Stalin in 1937, and Lev Lazarevich Feldbin, alias Aleksandr Orlov, who escaped to the United States and remained underground for more than a decade. The "renegacy" of Whittaker Chambers was driven by physical fear, at the height of the purges, that he would be kidnapped and taken to Moscow for execution. Other cases included that of the legendary Bolshevik diplomat and operative Fyodor Raskolnikov, who jumped, fell or was thrown from a window to his death in France soon after his break, and, of course, the well-known Samuel Ginsberg, or Walter Krivitsky.

Krivitsky, who had been a comrade of Reiss and Orlov, died in a Washington hotel room in 1941, allegedly a suicide. The case remains mysterious, and Haynes and Klehr employ great care in their comment on it: "There were some puzzling aspects to his death that suggested murder." But once again, Romerstein knows no hesitancy; he writes, offering no substantiation, "Krivitsky was murdered."

Given the fate of individuals like Reiss, emblematic of the thousands of agents purged and executed within Russia in the late 1930s, the suggestion that any Soviet operative would have engaged in false reporting, which would have excited fatal suspicions in the higher ranks, is untenable if not surrealistic.

However, there is a major lesson to be drawn from Venona that for political reasons has been somewhat underestimated by historians of both the right and the left. It involves the extraordinary energy Soviet agents all over the globe dedicated to the pursuit and persecution of dissident leftists, both Russian and foreign, American as well as Spanish, German and other.

The extent of these obsessions is revealed in Venona not only by messages describing infiltration and manipulation of the American Trotskyist movement but even more so by those attesting to Soviet surveillance of various political targets on Mexican soil. The long list of enemies is eloquently presented in a Venona communication from Moscow to Mexico City dated June 11, 1945, a few days before a massive victory parade scheduled in Moscow to celebrate the end of World War II. This communiqué, sent simultaneously to KGB stations in Algiers, Bogotá, Brussels, London, Montevideo, New York, Ottawa, Paris, San Francisco, Tokyo, Washington and Zagreb, prohibits the issuance of visas to any nondiplomatic foreigner for a period of eleven days from June 15 to June 25.

The communiqué additionally demands special vigilance to make sure that none of the following elements might utilize the occasion of the victory celebration to infiltrate the Soviet Union "on terrorist missions": White Russian émigrés, nationalists (that is, Ukrainians or Armenians), Trotskyists, Zionists, priests, veterans of the "national legions" (presumably, foreign anti-Bolshevik forces during the Russian civil war), Mensheviks, Russian Constitutional Democrats and monarchists. A later message demands a survey and analysis of the presence in Mexico City (no doubt extremely marginal) of Russians, Ukrainians, Belarussians, Armenians, Georgians, mountain folk from the northern Caucasus, Central Asians and Balts who might have emigrated from the USSR. One can only add that the life of a northern Caucasian mountaineer, say a Chechen or Daghestani, in Mexico City in 1945, is a topic to which only literature, and that of a high imaginative order, could possibly do justice.

That the majority of these "anti-Soviet elements," such as Trotskyists, Mensheviks, Constitutional Democrats and monarchists, were, at that time, politically and organizationally on the edge of extinction, and that they had little or no presence in Mexico, to say nothing of Bogotá or Montevideo, seems to have been irrelevant to the KGB bosses in Moscow. In any case, thousands of refugees from the Soviet Union had attempted to remain in Western

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Europe, and some must have escaped to the Western Hemisphere. Polish exiles in Mexico were followed and surveilled to gauge the utility of clandestine operations against them. Nevertheless, the apprehensions of Moscow regarding such minuscule groups must appear absurdly exaggerated. As an additional example, on February 21, 1945, Moscow commanded that the KGB in Mexico City report on "the reaction in Armenian circles," presumably in the capital, to a synod of the Armenian Orthodox Church that had been held in the monastery of Echmiadzin in Armenia.

The irrational character of KGB orders is especially obvious in the continued tracking of Natalya Ivanovna Sedova, the isolated and psychologically bereft widow of the murdered Trotsky. After the 1940 slaying, Sedova lived for twenty more years just outside Mexico City on Calle Viena in the little house (a narrow and somewhat claustrophobic space that's more like a stone cabin) that had been inhabited by the couple for a year and a half before the killing. Her circle was small. Apart from Trotskyist militants like the Mexican writer Manuel Fernández Grandizo (G. Munis) and other exiles like Victor Serge, Sedova received few visitors and none of influence in the outside world. Even so, the KGB maintained a rigorous scrutiny over her activities.

In general, few who have examined KGB history have grasped how crucial the harassment of dissident leftists was to its mission. For the pro-Washington faction, only treason to the Stars and Stripes is important; to their critics, it is replying to the accusation of lack of patriotism in the American Communist milieu. In addition, the perception of KGB assassins hunting down Trotskyists and social democrats clashes with the sentimental idea of "the family of the left."

Romerstein has grasped some of the irony of this situation, but he applies to it his usual sloppiness. He asserts that aside from Sedova and their son, Leon Sedov, who was murdered in Paris in 1938, "the rest of Trotsky's family, with the exception of his young grandson, had all been killed or forced to commit suicide in Stalin's USSR." This is inaccurate, as anyone knowledgeable about post-Gorbachev Russian journalism and historiography should know.

One of Trotsky's grandchildren, who lives in Mexico today under the name Esteban Volkov, but who was born Vsevolod and is also known as Seva, had a sister, Alexandra, who remained in Russia and died of cancer in 1988. They were children of Trotsky's elder daughter, Zinaida, who committed suicide in Berlin, not in Russia, after a nervous breakdown. But they also had two cousins, the offspring of Trotsky's other daughter, Nina, who succumbed to tuberculosis in 1928. None of this third generation are known to have "been killed or forced to commit suicide." Numerous similar gaffes appear in this book.

Trotskyists were "polecats" in the Venona code vocabulary. This was not the only example of such insults; Zionists were referred to as "rats." This is unpleasant enough; but once again Romerstein ups the ante. On the dust jacket and in the book's text and footnotes, it is asserted that "the code word 'Rats' was used by NKVD both for Jews, generally, and for the Zionists.... They considered all Jews 'Jewish nationalists,' i.e., Zionists, and even distrusted the small group of Jewish Communists."

Unfortunately for Romerstein, there is not a single example in Venona that I'm aware of—and I've reviewed much of the material for books and articles of my own—of the use of "rat" to refer to Jews in general. And regardless of how few Communists were Jewish in the longer run of history, the roster of KGB agents of Jewish origin speaking to one another in Venona is, sadly, pretty long. They include, among a great many others, Gen. Naum Eitingon, organizer of the attack on Trotsky ("Tom"); Grigory Kheifitz ("Kharon"), who was KGB "rezident" (local chief) in San Francisco; and one of the most assiduous and deadly of all Soviet spies, Mark Zborowski ("Tulip"). An accomplice in the murder of Ignacy Reiss, betrayer of Leon Sedov and co-conspirator in numerous other crimes, Zborowski reinvented himself in America as a medical anthropologist. It is difficult to imagine Moscow referring to any of these valuable assets as "rats," even though many of them were purged under Khrushchev and imprisoned after the elimination of their master, Lavrenti Beria.

Stalinism remains among the most horrifying features of the twentieth century. Millions of innocents were killed, and millions of idealists were used and destroyed—the original, honorable socialist and labor movements were often profoundly undermined and in certain cases wrecked. Some of the countries that lived under Stalinist regimes may not recover for generations. To distort and exploit this tragedy for any ideological goal, either leftist or rightist, is as distasteful as it is in the case of the Jewish Holocaust. Herbert Romerstein, like David Horowitz and others of their cohort, is, to recall a phrase from the 1960s, part of the problem, not part of the solution. ■

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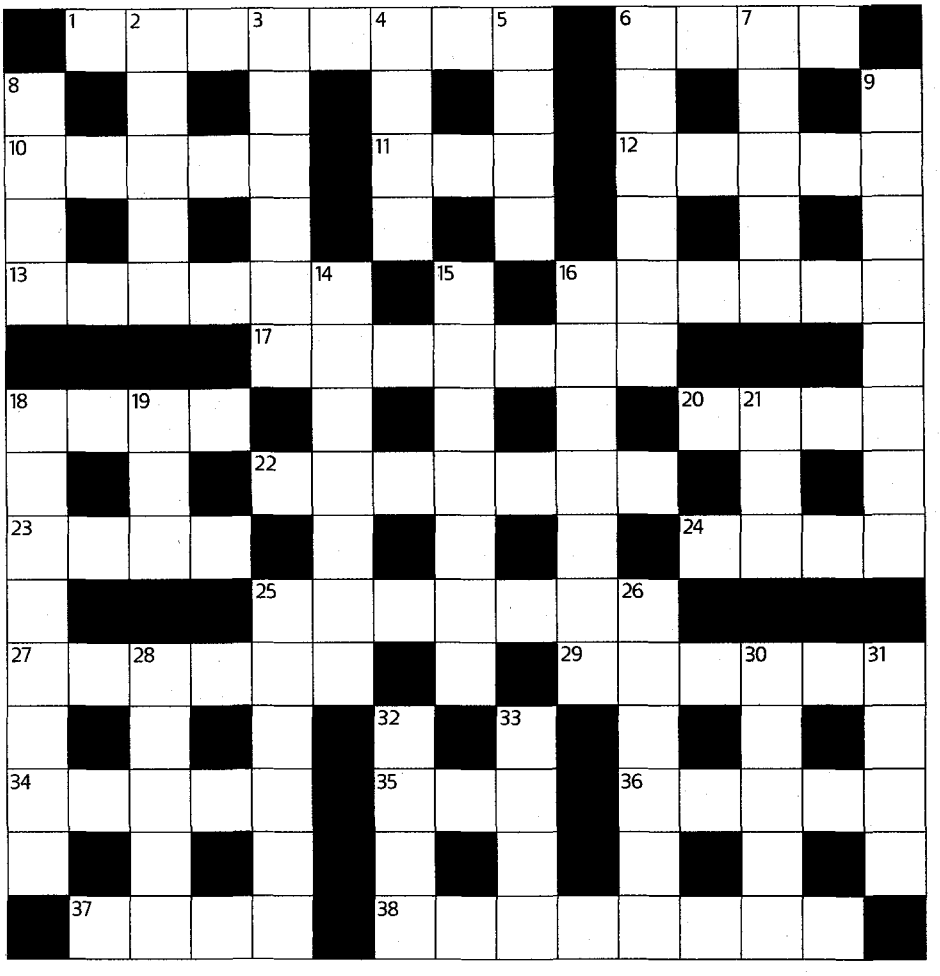

ACROSS

1 My aching back! Just what it needs and allowed to get something around the wrist. (8)

6 Cooked peas during recess? (4)

10, 11 and **12** A fire possibly—or the need for an early wake-up or something just as scary! (5,3,5)

13 What might be in the garden had returned but with backache, for example. (6)

16 Grandpa used it on the porch, being a fairly up-to-date musician! (6)

17 How do you make this subservient? "Down in front!" would do it! (7)

18 and **32** down Pat's some bad example but might help 13 grow up! (4,4)

20 Would the British consider it a name good for a lift? Make it so! (4)

22 Peck's Bad Boy might have deserved a good one, but it was mainly a Maine pursuit. (7)

23 A big Assembly party perhaps, but it's one way to pick things to pieces! (4)

24 See 8 down

25 What one might be doing at the plate with some cotton? (7)

27 A big place in California and a place in Nevada (of unspecified size) might make it, for certain! (6)

29 Sawyer gets to act badly—but when on the fence, at times is considered a nuisance. (6)

34, 35 and **36** Not a little new social occasion, but that's what the elephant has to stand for! (5,3,5)

37 With a pointed affirmative you might put only one of yours to… (4)

38 …this, which makes the agent Scotch, perhaps. (8)

DOWN

2, 19 and **28** Crude like Zachary Taylor! (5-3-5)

3 Not exactly direct, but you might get something on it! (6)

4 and **5** Got away from the act on the stage, since it is occasionally forbidden on the road. (4,4)

6 Flower of South America and reputedly a big, strong and healthy one! (6)

7, 21 and **30** Well, it's one way to build a house—but if you do, that's cheating! (5,3,5)

8 and **24** across A British investigative agency examination—reputedly a final one. (4,4)

9 Pretty fancy dishes for the in crowd! (5,3)

14 A rather coy manner, but many people pass through it. (7)

15 Take little notice—a sort of turn goes dead, but you might worship things like this. (7)

16 Was Regan wrong to have part of the Bible ruling? (7)

18 A necessary indication, if you are supposed to put two and two together! (4,4)

19 See 2

21 See 7

25 Reputedly gay types from Toledo? (6)

26 When you have to leave, a short spell will give you the truth as some people know it! (6)

28 See 2

30 See 7

31 Doesn't work seriously with such as blocks? (4)

32 See 18 across

33 Rap this in a hurry but in a nonoperative manner. (4)

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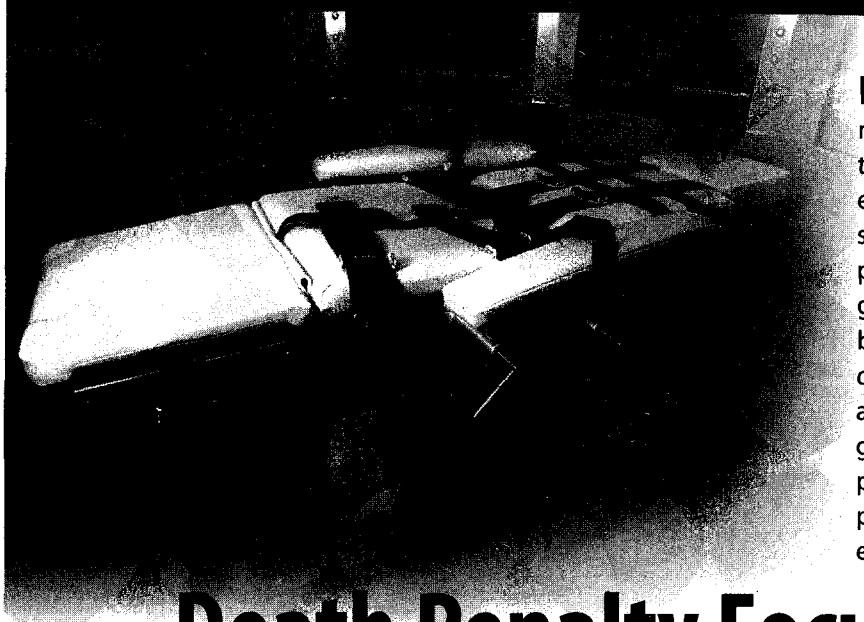

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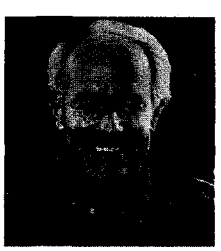

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